255 N.C. App.—No. 3 Pages 451-695

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 27, 2019

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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MARK DAVIS[13]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

Clerk
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Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis[14]
Jaye E. Bingham-Hinch[15]

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[14]Retired 31 August 2018. [15]Began 13 August 2018.

COURT OF APPEALS

CASES REPORTED

FILED 19 SEPTEMBER 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

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by determining that an actual partition of the pertinent property could not be made without causing substantial injury to one or more of the interested parties. The trial court failed to make specific findings of fact necessary to support an order for partition by sale of the parcels under N.C.G.S. § 46-22, including the value of each individual parcel and the value of each share of the parcels if they were to be physically partitioned. **Solesbee v. Brown, 603.**

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Right to sound basic public education—local board of county commissioners not responsible—The trial court did not err by granting a local board of county commissioners' motion to dismiss under Rule 12(b)(6) of a claim by North Carolina schoolchildren asserting a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, based on the board's alleged failure to adequately fund certain aspects of public schools. The board did not bear the constitutional duty to provide a sound basic education, and the correct avenue for addressing plaintiffs' concerns in the present case was through the ongoing litigation in *Leandro I* and *Leandro II*. **Silver v. Halifax Cty. Bd. of Comm'rs, 559.**

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Motion to suppress—traffic stop—lack of reasonable suspicion—The trial court erred in a common law robbery case by denying defendant's motion to suppress evidence obtained by law enforcement officers following an investigatory stop, based on lack of reasonable suspicion. The officers had no evidence of any criminal activity to which they could objectively point, and the series of activities did not provide reasonable suspicion. **State v. Nicholson, 665.**

Vehicle stop—objective justification for stop—motion to suppress evidence—reasonable suspicion—The trial court did not commit plain error in a driving while impaired case by denying defendant's motion to suppress evidence resulting from the stop of her vehicle, including various field sobriety tests, where the evidence together provided an "objective justification" for stopping defendant. The totality of circumstances showed defendant's vehicle was idling in front of a

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

BLUE RIDGE HEALTHCARE HOSPITALS INC. D/B/A CAROLINAS HEALTHCARE SYSTEM – BLUE RIDGE, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT

AND

CALDWELL MEMORIAL HOSPITAL, INC. AND SCSV, LLC, RESPONDENT-INTERVENORS

No. COA17-137

Filed 19 September 2017

1. Hospitals and Other Medical Facilities—operating rooms—certificate of need—agency criteria—geographic scope

In case involving the opening of an ambulatory surgical center and the issue of geographic scope, the hospital challenging the new surgical center did not meet its burden of showing that the Department of Health and Human Services' (the Agency's) interpretation and application of N.C.G.S. § 131E-183(a) was unreasonable or based on an impermissible construction of the statute. The Agency used its articulated and established practice of applying the standards and definitions set forth in the Administrative Code for determining certificates of need.

2. Hospitals and Other Medical Facilities—certificate of need—operating rooms—criteria—duplicate facts

In an action arising from a certificate of need (CON) proceeding for an ambulatory surgical center, the hospital did not show that the Department of Health and Human Services failed to perform an independent review and application of a criterion when it relied on facts used for other criteria.

3. Hospitals and Other Medical Facilities—certificate of need—ambulatory surgical center—financial and operational projections

The Department of Health and Human Services did not err in a certificate of need (CON) proceeding involving an ambulatory surgical center in its consideration of the criteria involving financial and operational projections. Although the hospital objecting to the ambulatory surgical center contended that this criteria was not satisfied because the application for the CON contained no documentation of the builder's financing or funding source, the application was not required to show the builder's source of funding for the construction of the shell building.

4. Hospitals and Other Medical Facilities—certificate of need—ambulatory surgical center—prejudice

The lack of prejudice to the objecting hospital provided an alternative basis for affirming a certificate of need for an ambulatory surgical center. Normal competition does not constitute a showing of substantial prejudice from a certificate of need.

Appeal by petitioner from Final Decision entered 3 October 2016 by Administrative Law Judge Selina Malherbe Brooks in the North Carolina Office of Administrative Hearings. Heard in the Court of Appeals 23 August 2017.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Carrie A. Hanger and Matthew Nis Leerberg, for petitioner-appellant Blue Ridge Healthcare Hospitals, Inc. d/b/a Carolinas Healthcare System – Blue Ridge.

Attorney General Joshua H. Stein, by Assistant Attorney General Jill A. Bryan and Special Deputy Attorney General June Ferrell, for respondent-appellee North Carolina Department of Health and Human Services.

Williams Mullen, by Joy Heath and Elizabeth D. Scott, for respondent-intervenors-appellees Caldwell Memorial Hospital, Inc. and SCSV, LLC.

TYSON, Judge.

Blue Ridge Healthcare Hospitals, Inc. d/b/a Carolinas Healthcare System – Blue Ridge ("Blue Ridge") appeals from a final decision of the Administrative Law Judge ("ALJ"), which granted summary judgment in favor of the North Carolina Department of Health and Human Services ("DHHS"), Caldwell Memorial Hospital, Inc. ("Caldwell Memorial"), and SCSV, LLC. We affirm.

I. Background

A. Caldwell Memorial

Caldwell Memorial is a not-for-profit community hospital located in Lenoir, North Carolina, which became part of the UNC Health Care System in 2013. Caldwell Memorial operates and maintains eight operating rooms, which are the only operating rooms located in Caldwell County. Three of the operating rooms are located at Hancock Surgery

Center ("HSC"), which is housed in an older building previously used as a shopping center. HSC is located approximately 0.6 miles from Caldwell Memorial, and is licensed as part of Caldwell Memorial.

In July 2015, Caldwell Memorial and SCSV, LLC (collectively, "Caldwell Memorial") filed a Certificate of Need ("CON") application with DHHS's Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section ("the Agency"), seeking approval to establish Caldwell Surgery Center ("CSC"), a new separately-licensed ambulatory surgery center to be located in Granite Falls, one to two miles from the southern border of Caldwell County.

Caldwell Memorial seeks to create a second point of surgery access within a more densely populated area of Caldwell County in addition to the city of Lenoir. Ambulatory surgical centers are capable of offering surgical services to patients at a purported lower cost than surgeries performed inside of hospitals. Caldwell Memorial asserts an ambulatory surgery center is suited to attract and retain capable surgeons by offering physician investment opportunities, which are not available in hospital operating rooms. The propriety of this investment opportunity is not before us.

The total inventory of currently licensed operating rooms located in Caldwell County would not change as a result of Caldwell Memorial's proposal. Caldwell Memorial had sought previous approval in 2014 to relocate the three operating rooms from HSC to CSC, but the Agency denied the CON application.

B. Blue Ridge

Blue Ridge maintains and operates six operating rooms at its Morganton hospital campus and four operating rooms at its Valdese hospital campus. It submitted written comments in opposition to the application, and participated in the public hearing held in September 2015. Blue Ridge had also submitted its objections to Caldwell Memorial's previous CON applications. Two other hospitals and an ambulatory surgery center in the extended geographical area also submitted comments in opposition to Caldwell Memorial's applications.

The proposed site for CSC is five miles from both Viewmont Surgery Center and Frye Medical Center, twelve miles from Catawba Valley Medical Center, and eleven miles from Blue Ridge's Valdese hospital campus. All of these facilities possessed surgical capacity during the Agency's review. Viewmont Surgery Center in Catawba County is the only multi-specialty ambulatory surgery center in the area, but does not

offer the surgical specialties proposed in Caldwell Memorial's CON application, such as spine and vascular surgery. Blue Ridge notes the existence of a significant surplus of operating rooms in Caldwell, Burke, and Catawba Counties in support of its opposition to Caldwell Memorial's application.

C. Agency and ALJ Decision

By letter dated 28 December 2015, the Agency notified Caldwell Memorial of its decision to conditionally approve its application to establish the ambulatory surgery center. On 29 January 2016, Blue Ridge filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH") and challenged the Agency's decision to approve Caldwell Memorial's CON application. *See* N.C. Gen. Stat. § 131E-188(a) (2015) (providing any "affected person" is entitled to bring a contested case challenging the agency's decision on a CON application); N.C. Gen. Stat. § 131E-188(c) (defining "affected person" to include "any person who provides services, similar to the services under review, to individuals residing within the service area or geographic area proposed to be served by the applicant"). The ALJ permitted Caldwell Memorial and Frye Regional Medical Center, LLC ("Frye") to intervene.

Caldwell Memorial and the Agency moved for summary judgment before the OAH on 9 September 2016. Blue Ridge and Frye opposed the motion. By final decision entered on 3 October 2016, the ALJ granted summary judgment in favor of Caldwell Memorial and the Agency. Blue Ridge appeals.

II. Jurisdiction

Jurisdiction lies in this Court from the final decision of the ALJ pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-27(a) (2015).

III. Issues

Blue Ridge argues the Agency erred by ignoring or applying certain criteria set forth in N.C. Gen. Stat. § 131E-183 when it approved Caldwell Memorial's CON application and asserts genuine issues of material fact exist regarding the conformity of the CON application with the statutory review criteria.

IV. Standard of Review

The North Carolina Administrative Code governs our review of the ALJ's decision, and provides:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It

> may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. . . .
>
> (d) In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

N.C. Gen. Stat. § 150B-51 (2015).

"This Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner's rights. . . . [and] that the agency erred in one of the ways described above." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 235 N.C. App. 620, 624, 762 S.E.2d 468, 471 (2014) (citation, quotation marks, and brackets omitted).

Here, Blue Ridge appeals from the ALJ's order granting summary judgment. Summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

The evidence "must be viewed in a light most favorable to the non-moving party." *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 136, 757 S.E.2d 302, 304, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014) (citation omitted). "The party seeking summary judgment bears

the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations omitted).

"We review [the ALJ's] order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

V. Agency's Application of N.C. Gen. Stat. § 131E-183 Criteria

Our General Assembly recognized that potential and projected profits would drive the development of medical facilities and services in the marketplace. The General Assembly concluded the public is best served by having access to affordable healthcare that is distributed throughout the State based upon certificates of need. *See* N.C. Gen. Stat. § 131E-175(1)-(4) (2015). Otherwise, an over-abundance of facilities in certain areas would "lead[] to unnecessary use of expensive resources and overutilization of health care services" and result in greater costs to the public. *See* N.C. Gen. Stat. § 131E-175(4), (6)-(10).

The Agency's decision to approve an applicant's CON is based upon the Agency's determination of whether the applicant has complied with the list of review criteria set forth in N.C. Gen. Stat. § 131E-183(a). "The [Agency] shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." N.C. Gen. Stat. § 131E-183(a) (2015); *see also Parkway Urology, P.A., v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 191-92 (2010), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011).

A. Geographic Scope of Agency's Review

[1] Blue Ridge argues the agency incorrectly limited its analysis of Criteria 3, 3a, 4, and 6 to the circumstances in Caldwell County, and did not consider any facilities, utilization, needs of the population, or circumstances in any of the other counties from which Caldwell Memorial is projected to draw patients to the new facility.

Blue Ridge further asserts the Agency failed to assess how the needs of patients from other counties would be met by the proposed relocation

of operating rooms or how they would be impacted by physicians' plans to perform cases and procedures at the new facility, resulting in the reduction of services provided at facilities in other counties.

The four criteria of N.C. Gen. Stat. § 131E-183(a) at issue requires the following of the CON applicant:

> (3) The applicant shall identify the *population to be served* by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.
>
> (3a) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that *the needs of the population presently served* will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.
>
> (4) Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.
>
> . . . .
>
> (6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

N.C. Gen. Stat. § 131E-183(a) (emphasis supplied).

While Criterion 3 requires identification of the "population to be served" and the "need that this population has for the services proposed," the statute does not set forth the precise method by which this analysis is to be performed. Criterion 3 does not set forth guidance concerning the geographical location of the "population to be served" or the "area." N.C. Gen. Stat. § 131E-183(a)(3). Caldwell Memorial's CON application projected that 50.2% of the new facility's operating room's patients would come from Caldwell County, and 49.8% would come

from outside of Caldwell County. For the procedure room, only 38.52% of the patients are projected to come from Caldwell County and 61.48% from elsewhere.

Similarly, Criterion 3a requires identification and an analysis of the "population presently served," which includes patients from a multi-county area. N.C. Gen. Stat. § 131E-183(3a). Blue Ridge argues the Agency limited its analysis of the reduction in services to facilities and patients located within Caldwell County, and ignored the impact on medically underserved groups in other counties, who would be required to travel farther to the new facility.

Criteria 4 and 6 also do not set forth any geographical scope for the Agency's analysis. With regard to Criterion 4, Blue Ridge asserts the Agency improperly limited its analysis of whether Caldwell Memorial "demonstrate[d] that the least costly or most effective alternative has been proposed," where alternative methods for meeting the proposed project's needs exist. N.C. Gen. Stat. § 131E-183(a)(4).

Finally, Blue Ridge asserts the Agency ignored the numerous surgical facilities located in Burke County, very near to the proposed site of the Granite Falls facility, in applying Criterion 6 to determine whether Caldwell Memorial demonstrated the "project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

Blue Ridge relies upon this Court's decision in *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, 240 N.C. App. 92, 771 S.E.2d 537 (2015). That case dealt with the Agency's interpretation of Criterion 20 of N.C. Gen. Stat. § 131E-183(a), which states "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." N.C. Gen. Stat. § 131E-183(a)(20).

This Court recognized, "[b]ecause the General Assembly has not articulated with specificity how the Agency should determine an applicant's conformity with Criterion 20, *the Agency was authorized to establish its own standards* in assessing whether an applicant that was already involved in providing health care services had provided quality care in the past." *AH N.C. Owner*, 240 N.C. App. at 100, 771 S.E.2d at 542 (emphasis supplied).

In *AH N.C. Owner*, the Agency reviewed multiple competing CON applications, which proposed to expand the number of nursing home beds in Wake County in response to a determination of need. *Id.* at 95, 771 S.E.2d at 539. Consistent with the Agency's prior practice, it

evaluated each applicant's conformity with Criterion 20 by examining each applicant's history of quality of care solely within Wake County, which resulted in an evaluation of past quality of care for those applicant's who already operated facilities in Wake County. *Id.* at 101, 771 S.E.2d at 542-43. The ALJ rejected the Agency's limit of its review of Criterion 20 to only Wake County. *Id.*

This Court explained:

> As the ALJ noted, certain review criteria in N.C. Gen. Stat. § 131E-183(a) are specifically limited to the service area of the proposed project. Criterion 18a, for example, requires the applicant to "demonstrate the expected effects of the proposed services on competition *in the proposed service area* . . . ." N.C. Gen. Stat. § 131E-183(a)(18a) (emphasis added). Criterion 20, on the other hand, contains no such geographic limitation.
>
> It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 101, 708 S.E.2d 399, 404 (2011). Furthermore, as this Court has previously explained, "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citation, quotation marks, and brackets omitted).

Id. at 111, 771 S.E.2d at 548-49 (alterations in original).

This Court affirmed the ALJ and held "basic principles of statutory construction support the ALJ's conclusion that the General Assembly did not intend for the Agency's evaluation of an applicant's past quality of care to be limited to the service area of the proposed project." *Id.* at 112, 771 S.E.2d at 549.

As specifically stated in *AH N.C. Owner*, the Agency is authorized to "establish its own standards" to determine whether the applicant met the requirements of the statutory criteria. *Id.* at 100, 771 S.E.2d at 542. "It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should *defer to the agency's*

interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006) (citations omitted) (emphasis supplied).

"If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Cty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) (citation, quotation marks, and brackets omitted), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999).

Our decision in *AH N.C. Owner* is distinguishable and does not control our analysis and outcome here. In that case, in "consider[ing] whether deference should be accorded to the Agency's interpretation of . . . the appropriate geographic scope of the quality of care assessment required under Criterion 20," the Court determined the existence of "no logical basis for disregarding such information evidencing quality of care on a statewide level[,]" and "such a policy actually contravenes one of the primary purposes of the CON laws." *AH N.C. Owner*, 240 N.C. App. at 110-13, 771 S.E.2d at 548-49. The Court further stated, "[s]ignificantly . . . Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20." *Id.* at 113, 771 S.E.2d at 549.

Here, unlike in *AH N.C. Owner*, Martha Frisone, Assistant Chief of the DHHS's CON section, testified by deposition that "it has long been Agency practice to use the same standards duly promulgated in the [administrative] rules when evaluating the statutory criteria, which don't [sic] contain any standards at all[.]" The Agency's practice is consistent with the law.

N.C. Gen. Stat. § 131E-183(b) specifically states the Agency "is authorized to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) . . . and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed." *See Craven*, 176 N.C. App. at 51, 625 S.E.2d at 841 (recognizing "the Agency has adopted rules to be used as regulatory criteria *in conjunction* with Criterion 3" (emphasis supplied)).

Ms. Frisone further stated:

> Where a patient goes and where a surgeon goes is surgeon and patient choice. And so the need methodology itself for

> determining a need for additional ORs does not take into account surpluses in adjoining counties, and we don't take them into account either in reviewing a – certainly not in reviewing a proposal to relocate two existing dedicated outpatient ORs and license them separately as an AMSU, which would reduce the cost for the patient.

Ms. Frisone explained the Agency reviewed the statutory criteria in conjunction with the provisions of the North Carolina Administrative Code, which state the requirements an applicant must meet to establish need for operating rooms and ambulatory surgical facilities. *See* 10A N.C.A.C. 14C.2101 *et seq.* Title 10A, Subchapter 14C of the Administrative Code sets forth the "Certificate of Need Regulations."

Section 2100 states the "criteria and standards for surgical services and operating rooms," and defines "service area" as "the Operating Room Service Area as defined in the applicable State Medical Facilities Plan ['SMFP']." 10A N.C.A.C. 14C.2101(10). In 2015, the SMFP defined "service area" as "the operating room planning area in which the operating room is located. The operating room planning areas are the single and multicounty groupings shown in Figure 6-1." Figure 6-1 of the SMFP shows Caldwell County as a single county operating room service area.

Unlike in *AH N.C. Owner*, the Agency used its articulated and established practice of applying the standards and definitions set forth in the Administrative Code for determining certificates of need, where N.C. Gen. Stat. § 131E-183(a) is silent on the geographic scope of the Agency's review. Giving deference to the Agency's procedures and practice, we hold Blue Ridge has failed to meet its burden to show the Agency's interpretation and application of N.C. Gen. Stat. § 131E-183(a) is unreasonable or based on an impermissible construction of the statute. *Craven*, 176 N.C. App. at 58, 625 S.E.2d at 844. Blue Ridge's argument is overruled.

B. Application of Criterion 6

[2] Blue Ridge argues the Agency failed to apply Criterion 6 as an independent criterion, where the findings under Criterion 6 simply repeat findings under other criteria. Blue Ridge bases its claim upon the inclusion of the following language in the Agency's findings for Criterion 6: "The discussions regarding analysis of need, alternatives and competition found in Criteri[a] (3), (4) and (18a), respectively, are incorporated herein by reference." The Agency concluded Caldwell Memorial "adequately demonstrate[s] that the proposed project would not result in the unnecessary duplication of existing or approved ORs in Caldwell County."

Ms. Frisone explained that the Agency evaluates each criterion independently, and frequently relies upon the same facts in making its determination under each criterion. The Agency is permitted to rely upon the same facts and evidence in reviewing multiple criteria. Blue Ridge has failed to show the Agency failed to undertake an independent review and application of Criterion 6.

C. Application of Criterion 5

[3] Blue Ridge argues the Agency erred in its application of Criterion 5, which requires Caldwell Memorial to show:

> (5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5).

Criterion 5 requires an applicant to demonstrate: (1) the availability of funds for capital and operating needs, and (2) the financial feasibility of the proposal based upon the applicant's reasonable projections. *Id.*

The Agency must "determine the availability of funds for the project from the entity responsible for the funding[.]" *Retirement Villages, Inc. v. N.C. Dep't of Human Res.*, 124 N.C. App. 495, 498, 477 S.E.2d 697, 699 (1996). "[I]n cases where the project is to be funded other than by the applicants, the application must contain evidence of a commitment to provide the funds by the funding entity." *Id.* at 499, 477 S.E.2d at 699. "Without a commitment, an applicant cannot adequately demonstrate availability of funds or the requisite financial feasibility." *Johnston Health Care Ctr., L.L.C. v. N.C. Dep't of Human Res.*, 136 N.C. App. 307, 313, 524 S.E.2d 352, 357 (2000). "[T]he above statutory criterion does not require the submission of financial statements by the applicants. It merely requires the Agency to determine the availability of funds for the project from the entity responsible for funding, which may or may not be an applicant." *Retirement Villages*, 124 N.C. App. at 498-99, 477 S.E.2d at 699.

In its CON application, Caldwell Memorial asserted the CSC shell building would be constructed by Brackett Flagship Properties, LLC ("BFP"). BFP would create a limited liability company to serve as the landlord and lease the property to Caldwell Memorial. Caldwell Memorial would be responsible for the design and upfit of the building.

Caldwell Memorial estimated the total cost associated with the building to be $4,350,000.00.

The Agency determined that total capital cost of the project will be $3,650,000.00, and the working capital costs will be $700,000.00. Caldwell Memorial provided a letter dated 8 July 2015 from a Vice President of First Citizens Bank, which includes two term sheets of the proposed financing for the project. One shows the financing for the capital costs of $3,650,000.00 and the other shows the financing for the working capital costs of $700,000.00.

Caldwell Memorial also provided a letter dated 8 July 2015 from appellant SCSV, LLC, which stated SCSV was committed to utilizing the funding provided by the bank to develop the facility. Caldwell Memorial provided another letter from its vice president and chief financial officer, which confirmed that Caldwell Memorial is committed to financing a portion of the capital costs in the amount of $150,000.00, and the hospital has sufficient funds on hand to cover this cost. The Agency concluded Caldwell Memorial "adequately demonstrate[d] that sufficient funds will be available for the capital and working capital needs of the project," and "that the financial feasibility of the proposal is based upon reasonable projections of costs and charges."

Blue Ridge argues the Agency erred in determining Criterion 5 was satisfied where Caldwell Memorial's CON application contained no documentation of BFP's finances or funding source. We disagree.

Our Court has determined similar arrangements to be in conformity with the requirements of Criterion 5. In *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 615 S.E.2d 81 (2005), the Agency awarded a CON to Bio-Medical Applications ("BMA") for ten kidney dialysis machines, to be located inside a building to be leased from a lessor, who would "upfit, install, and build" the building. *Id.* at 735-36, 615 S.E.2d at 82. The ALJ determined BMA's application was non-conforming to Criterion 5, because BMA had failed to include the future lessor as an applicant. *Id.* This Court overruled the ALJ and upheld the Agency's determination that BMA was not required to name the lessor as an applicant, and BMA's CON application was in conformity with the statutory criteria. *Id.* at 739, 615 S.E.2d at 84.

Caldwell Memorial's costs to lease the building, upfit and house the ambulatory surgery center are properly asserted and accounted for. Its application separately documented the availability and commitment of funds for the acquisition of the specialized medical equipment necessary to develop and improve the ambulatory surgery center in the shell

building. Caldwell Memorial was not required to show a source of funding for BFP's construction of the shell building. *See id.* Blue Ridge's argument is overruled.

VI. Substantial Prejudice

[4] As an alternate basis to affirm the ALJ's decision, it is well-established that "when the petitioner alleges [agency error], the petitioner *must also* prove . . . substantial prejudice." *Surgical Care Affiliates*, 235 N.C. App. at 628, 762 S.E.2d at 473-74. Even if the Agency erred in its application of the statutory criteria in reviewing Caldwell Memorial's CON, Blue Ridge has also failed to meet its burden of showing prejudice in the Agency's decision to grant the CON to reverse the ALJ's decision.

The Agency determined that Caldwell Memorial's proposed project does not involve the addition of any new health service facility beds, services, or equipment. The project involves relocating three existing operating rooms from HSC to a separately licensed and freestanding ambulatory surgical facility. The Agency determined Caldwell Memorial owns and operates all eight operating rooms in Caldwell County, and there are no existing ambulatory surgical facilities in Caldwell County. The total number of operating rooms currently located in Caldwell County will not change. Only how those operating rooms are licensed, and where they are located within Caldwell County, will change under the CON.

Blue Ridge argues it would lose patients and profits due to the approval of the CSC facility. Blue Ridge asserts Dr. Jason Zook, a spine surgeon who operates at Blue Ridge's facility, has expressly stated he intends to direct all of his surgeries to CSC in Granite Falls. Blue Ridge asserts it has spent significant funds in recruiting Dr. Zook and establishing Blue Ridge's spine surgery program. Blue Ridge also argues its other services, specifically the neonatal and emergency services, would be compromised by losing the profits provided by Dr. Zook's surgeries.

Our Court has explained that adopting Blue Ridge's argument "would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a)." *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195.

As in the present case, the appellant in *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, 231 N.C. App. 1, 8, 751 S.E.2d

244, 249 (2013), asserted that specific evidence of financial harm resulting from the award of a CON constitutes a showing of substantial prejudice. This Court rejected the argument in *CaroMont* and held that such a physician-directed "shift" of cases is "normal competition." *Id.* at 8, 751 S.E.2d at 250.

The Court explained that the claim of harm arose "solely out of the fact that competition would be increased by virtue of the authorization of two additional GI endoscopy rooms located in Gaston County" so "patients and doctors in Gaston County would now have a choice between CaroMont's facilities and another separate facility also located in Gaston County." *Id.* at 9, 751 S.E.2d 250. As in *CaroMont*, Blue Ridge has asserted harm from normal competition, which does not constitute a showing of substantial prejudice from the Agency's allowance of the CON. *Id.*

Blue Ridge's failure to show substantial prejudice is also fatal to its contested case. The ALJ correctly granted summary judgment in favor of the Agency and upholding the Agency's approval of the CON for Caldwell Memorial.

VII. Conclusion

We review the Agency's application of the criteria set forth in N.C. Gen. Stat. § 131E-183(a) with deference to the Agency's interpretation of the statute. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 844. Blue Ridge has failed to carry its burden to show the Agency's interpretation was either unreasonable or not based upon a permissible construction of the statute. *See id.*

As an alternative and independent basis for our holding, Blue Ridge has also failed to show it was substantially prejudiced by the Agency's approval of Caldwell Memorial's CON application and issuance of the CON. *See Caromont*, 231 N.C. App. at 8-9, 751 S.E.2d at 249-50. The ALJ's order granting summary judgment in favor of Caldwell Memorial is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

COUNTY OF ONSLOW, STATE OF NORTH CAROLINA
v.
J.C., PETITIONER

No. COA17-207

Filed 19 September 2017

Appeal and Error—appealability—expunction of criminal charge—no right of appeal—failure to file petition for certiorari

The Court of Appeals dismissed the State's appeal from an order of the trial court finding petitioner to be eligible for (1) an expunction of a criminal charge to which petitioner pled guilty in 1987 and (2) an expunction of the dismissal of a criminal charge dismissed in exchange for petitioner's guilty plea to the other offense. N.C.G.S. § 15A-1445 does not include any reference to a right of the State to appeal from an order of expunction, and the State did not file a petition for certiorari.

Appeal by the State from order entered 8 August 2016 by Judge Mary Ann Tally in Onslow County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for Appellant, the County of Onslow, State of North Carolina.

Yoder Law PLLC, by Jason Christopher Yoder, for the Petitioner-Appellee.

DILLON, Judge.

The State appeals from an order of the trial court finding J.C. ("Petitioner") to be eligible for (1) an expunction of a criminal charge to which Petitioner pleaded guilty in 1987 and (2) an expunction of the dismissal of a criminal charge dismissed in exchange for Petitioner's guilty plea to the other offense. The trial court granted Petitioner's petitions for expunction pursuant to N.C. Gen. Stat. § 15A-145.5 (2015) and N.C. Gen. Stat. § 15A-146 (2015) and ordered that the offenses be removed from Petitioner's record.

We conclude that the State has no statutory right to appeal an order of expunction, and we hereby grant Petitioner's motion to dismiss the appeal.

"[A]n appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971) (holding that in general, the State cannot appeal from a judgment in favor of a defendant in a criminal proceeding in the absence of a statute clearly conferring that right). As our Supreme Court has pointed out, the statute "which permits an appeal by the State in a criminal case is contained in [N.C. Gen. Stat. §] 15A-1445" and this statute is to be "strictly construed." *State v. Elkerson*, 304 N.C. 658, 669-70, 285 S.E.2d 784, 791-92 (1982).

Our Court has previously held that where the State fails to demonstrate its right to appeal, "no appeal can be taken, and our Court is without jurisdiction over the appeal." *State v. Bryan*, 230 N.C. App. 324, 329, 749 S.E.2d 900, 904 (2013). Here, because N.C. Gen. Stat. § 15A-1445 clearly does not include any reference to a right of the State to appeal from an order of expunction, we are compelled to conclude that the General Assembly did not intend to bestow such a right at the time the statute was adopted. "It is for the legislative power, not for the courts, to consider whether th[e] [statute] should [] be extended" to include such a right. *Hodges v. Lipscomb*, 128 N.C. 57, 58, 38 S.E. 281, 282 (1901). And while we note that our court has, on several occasions, reviewed expunctions, we have obtained jurisdiction to do so pursuant to the granting of a petition submitted to our Court by the State for writ of *certiorari*. *See, e.g.*, *State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (granting the State's petition for certiorari); *see also In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005); *In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005); *In re Expungement for Spencer*, 140 N.C. App. 776, 538 S.E.2d 236 (2000).

The State has not filed a petition for *certiorari* in this matter. Accordingly, the State's appeal is dismissed.

DISMISSED.

Judges HUNTER, JR., and ARROWOOD concur.

BELINDA FOUSHEE, EXECUTOR OF THE ESTATE OF ANNEKA FOUSHEE, PLAINTIFF
v.
APPALACHIAN STATE UNIVERSITY, DEFENDANT

No. COA17-213

Filed 19 September 2017

Appeal and Error—interlocutory appeals—Industrial Commission—statute of repose

An appeal from the Industrial Commission in a wrongful death claim was dismissed as interlocutory. The underlying issue concerned only a determination of the application of the statue of repose to plaintiff's tort claims arising under the Tort Claims Act. There was no issue of immunity that would create a substantial right justifying an immediate appeal.

Appeal by plaintiff from the order of the North Carolina Industrial Commission entered 28 November 2016 by Commissioner Linda Cheatham for the Full Commission. Heard in the Court of Appeals 24 August 2017.

Wallace & Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Christina S. Hayes, for defendant-appellant.

ARROWOOD, Judge.

Appalachian State University ("defendant") appeals from the Full Commission's dismissal of its appeal on 28 November 2016. For the following reasons, we dismiss defendant's appeal.

I. Background

Belinda Foushee ("plaintiff"), as executor of the estate of her daughter Anneka Foushee, commenced this wrongful death action against defendant on 7 April 2016 by filing a Form T-1 Affidavit with the North Carolina Industrial Commission (the "Commission") under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.* Defendant responded on 10 June 2016 by filing a motion to dismiss pursuant to Rule 12(b)(6) and (2). Defendant asserted (1) the plaintiff failed to state a claim upon which relief could be granted because the applicable ten year statute of repose expired prior to plaintiff's filing of the Form T 1; and (2) because

the statute of repose had expired, the State had not waived sovereign immunity in this case because, under the Tort Claims Act, the State and its agencies are liable for negligence only under circumstances where a private person would be liable. Plaintiff filed a response to defendant's motion to dismiss on 23 June 2016 and on the same day a deputy commissioner entered an order denying defendant's motion.

On 8 July 2012, defendant gave notice of appeal seeking the immediate review of the Full Commission. Defendant's appeal was referred to the chairman for a ruling on the right of immediate appeal. On 22 July 2016, the chairman entered an order, and then an amended order, denying defendant's request for immediate review of the deputy commissioner's 23 June 2016 order by the Full Commission. In the amended order, the chairman explained that the deputy commissioner's order was interlocutory and although denial of a Rule 12(b)(2) motion based on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is immediately appealable, in the instant case, "[d]efendant's sovereign immunity argument is actually based on [the] statute of repose, not immunity from suit." Thus, defendant had not met its burden of showing it would be deprived a substantial right.

Defendant filed a motion to reconsider the chairman's order on 8 August 2016 and the chairman denied the motion by order filed 23 August 2016. Defendant then filed notice of appeal from the chairman's 22 July 2016 amended order to the Full Commission on 25 August 2016.

Plaintiff filed a motion to dismiss defendant's appeal of the chairman's amended order to the Full Commission on 26 August 2016. Plaintiff argued the appeal of the chairman's amended order was interlocutory and should be dismissed. On 28 November 2016, the Full Commission filed an order dismissing defendant's appeal. The Full Commission explained that "[n]either the State's Tort Claims Act, nor the Commission's *Tort Claims Rules* provide for a right of immediate appeal to the Full Commission from interlocutory Orders."

Defendant filed notice of appeal to this Court from the Full Commission's 28 November 2016 order on 19 December 2016.

II. Discussion

The sole issue on appeal is the Full Commission's dismissal of defendant's interlocutory appeal. Plaintiff moved to dismiss defendant's appeal as interlocutory. We agree that the appeal is interlocutory and dismiss defendant's appeal without reaching the merits of the underlying issues below.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (internal citations and quotation marks omitted).

Defendant argued below, and now argues on appeal, that although the Commission's orders are interlocutory, the orders affect a substantial right and concern personal jurisdiction and are therefore immediately appealable. However, the merits of the underlying orders are not on appeal to this Court. To be clear, the only order on appeal to this Court is the Full Commission's order that determined there was no right of immediate appeal from an interlocutory decision in a case before the Commission arising under the Tort Claims Act. As plaintiff asserts, this appeal is not an appeal of the merits of the deputy commissioner's denial of defendant's motion to dismiss.

The Full Commission's order is clearly interlocutory as it is not a final determination of plaintiff's claims. Furthermore, defendant has not met its burden to show that the Full Commission's decision dismissing the appeal affects a substantial right. Consequently, defendant's appeal to this Court is dismissed as interlocutory.

Nevertheless, we take this opportunity to note that although defendant argues in the underlying motions that the statute of repose and immunity issues are intertwined and the appeal therefore affects a substantial right and implicates personal jurisdiction, it appears the underlying issue concerns only a determination of the application of the statute of repose to plaintiff's tort claims arising under the Tort Claims Act. Defendant even states in its brief that it is "entitled to sovereign immunity in this claim for wrongful death *because it is barred by the statute of repose*." (Emphasis added). The underlying arguments

for the defendant do not raise an issue of sovereign immunity in the traditional sense. The only way immunity becomes an issue is if the statute of repose is applicable and has expired. Yet, if the statute of repose is applicable and has expired, the claim will be dismissed. Therefore, it is not necessary to address the issue of immunity. Thus, we ascertain no issue of sovereign immunity that would create a substantial right justifying an immediate appeal.

III. Conclusion

Because defendant's appeal from the Full Commission's 28 November 2016 order is interlocutory, we dismiss the appeal.

DISMISSED.

Judges HUNTER, Jr., and DILLON concur.

JORIS HAARHUIS, Administrator of the Estate of Julie Haarhuis (Deceased), Plaintiff
v.
EMILY CHEEK, Defendant

No. COA16-961

Filed 19 September 2017

1. Jury—selection—hypothetical question—not a stake-out question

A question asked during voir dire of the jury was hypothetical but was not a stake-out question because the facts presented were not similar to the underlying facts of the case and did not ask jurors to state what kind of verdict they would render. It asked a question about a key criterion of juror competency—following the law.

2. Jury—selection—questions—attitude toward damages

There was no prejudice from jury voir dire questions concerning damages in an automobile accident case, even assuming they were stake-out questions.

3. Jury—selection—questions—loss of caregiver—not a stake-out question

A jury voir dire question in an automobile accident case concerning whether the potential jurors had lost a caregiver was not

a stake-out question and was appropriate to allow both parties to evaluate the fitness of each juror.

4. Jury—questions on voir dire—not a stake-out question—juror's opinions of DUI laws

A question to prospective jurors about whether DUI laws were too harsh or too lax was not a stake-out question because it did not provide any facts of the case and did not ask the jurors to state what their verdict would be under a given state of facts. There was no prejudice to defendant.

5. Damages and Remedies—pain and suffering—instructions—conscious pain and suffering

The trial court did not err in an automobile accident case by instructing the jury on pain and suffering damages where defendant contended that there was not evidence of conscious pain and suffering. There was, in fact, evidence that the victim was trying to breathe and was moaning after being struck by defendant's vehicle, and the treating physician testified that the victim's injuries would be severely painful and that she responded to pain stimuli.

6. Damages and Remedies—loss of society and companionship

There was no error in an auto accident case in the admission of evidence about loss of society and companionship damages from the victim's cousin and one of her co-workers. The challenged evidence was relevant to the jury's determination of the value of the victim's society, companionship, comfort, kindly offices, and advice pursuant to N.C.G.S § 28A-18-2(b)(4)(c). Additionally, defendant made no argument as to how she was prejudiced.

7. Damages and Remedies—compensatory—deterrence

The trial court did not abuse its discretion in the compensatory phase of a bifurcated wrongful death trial by allowing plaintiff to argue that not awarding full and fair compensation would mean not creating the deterrent of making people pay for the harm they caused, and "not one penny more." A general deterrence argument is appropriate during the compensatory phase of a bifurcated trial so long as it does not refer to any of the aggravating factors in N.C.G.S. § 1D-15(a) or urge the trier of fact to punish the defendant.

8. Damages and Remedies—motion for a new trial—compensatory damages allegedly excessive

The trial court did not abuse its discretion in the bifurcated trial of an automobile accident case by determining that the

compensatory damage award was appropriate and denying defendant's motion for a new trial. Although defendant argued that the small punitive damages award indicated that the jury included a measure of punishment in the compensatory damage award, there was evidence that defendant made very little and it was not an abuse of discretion to determine that the amount was an adequate punishment for this defendant.

Appeal by Defendant from judgment entered 28 April 2016 by Judge Eric L. Levinson in Chatham County Superior Court. Heard in the Court of Appeals 5 April 2017.

Copeley Johnson & Groninger PLLC, by Leto Copeley, White & Stradley PLLC, by J. David Stradley and Robert P. Holmes, and Patterson Harkavy LLP, by Narendra K. Ghosh, for the Plaintiff-Appellee.

Burton, Sue & Anderson, LLP, by Walter K. Burton, Stephanie W. Anderson, and Cam A. Bordman, for the Defendant-Appellant.

DILLON, Judge.

Emily Cheek ("Defendant") appeals from a jury verdict awarding Joris Haarhuis ("Plaintiff") compensatory and punitive damages for the wrongful death of Plaintiff's wife, and from an order by the trial court denying Defendant's motion for a new trial. For the following reasons, we affirm.

I. Background

Plaintiff filed this action against Defendant to recover both compensatory and punitive damages for the wrongful death of his wife, Julie Haarhuis. Before trial, the parties stipulated to a set of facts establishing that Defendant negligently caused the death of Ms. Haarhuis, in relevant part, as follows: Defendant was driving on a two-lane road at approximately 6:30 a.m. She lost control of her vehicle, crossing the opposing lane of traffic and striking Ms. Haarhuis, who was walking on the opposite shoulder of the road. As a result of the accident, Ms. Haarhuis suffered severe injuries. Several days later, Ms. Haarhuis died as a result of those injuries.

The trial was bifurcated, with the first phase of the trial addressing compensatory damages and the second phase addressing punitive damages. During the compensatory damage phase, Plaintiff put on

evidence concerning his actual damages, including evidence of the suffering his wife endured before her death. The jury awarded Plaintiff $4.25 million in compensatory damages. The trial then moved to the punitive damage phase.

During the punitive damage phase of the trial, the jury heard evidence that Defendant was still in school and worked part time, that she had consumed alcohol in the early morning hours prior to the accident, and that she had a blood alcohol content above the legal limit approximately two hours after the accident occurred. The jury awarded Plaintiff $45,000 in punitive damages.

Defendant filed a motion for new trial which the trial court denied. Defendant appealed.

II. Analysis

On appeal, Defendant makes a number of arguments concerning the conduct of the trial and the trial court's denial of her motion for a new trial. We address each argument in turn.

When reviewing a trial court's ruling on a motion for a new trial, we consider whether there are grounds for a new trial pursuant to Rule 59. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2015). Our review is "limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

A. Right to a Bifurcated Trial

At trial, Defendant exercised her right to request a bifurcated trial pursuant to N.C. Gen. Stat. § 1D-30. See N.C. Gen. Stat. § 1D-30 (2015). On appeal, Defendant argues that Plaintiff's questioning of the jury during *voir dire* was improper and violated her "due process right" to a bifurcated trial because it involved issues that would only be relevant to Plaintiff's punitive damage claim.

Our General Assembly has provided that a plaintiff may not recover punitive damages where the defendant is not found to be liable for compensatory damages. N.C. Gen. Stat. § 1D-15. Therefore, to ensure that a jury does not award compensatory damages based on issues relevant only to punitive damages, our General Assembly has granted a defendant the right to a bifurcated trial, which allows "issues of liability for

compensatory damages and the amount of compensatory damages, if any, [to] be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any." N.C. Gen. Stat. § 1D-30. In a bifurcated trial, the plaintiff is not allowed to introduce any evidence "relating solely to punitive damages" during the compensatory damage phase. *Id.* In addition, the statute requires the same trier of fact that tried the issues relating to compensatory damages to try the issues relating to punitive damages. *Id.*

In the present case, Defendant does not argue that Plaintiff introduced improper evidence concerning Defendant's intoxication during the compensatory phase of the trial. Rather, she argues that Plaintiff's questioning of potential jurors during *voir dire* regarding their general attitudes about alcohol and drunk driving – questions which were only relevant to the punitive damage phase of the trial – was inappropriate.[1]

We acknowledge that N.C. Gen. Stat. § 1D-30 presents a dilemma of sorts, as suggested by Defendant's argument. Specifically, N.C. Gen. Stat. § 1D-30 gives a defendant the right to a bifurcated trial in order to ensure that the jury, when considering the issue of compensatory damages, is not improperly influenced by evidence relevant only to punitive damages. However, a defendant's right to bifurcation must be weighed against a plaintiff's right to an impartial jury, which includes a plaintiff's right to question potential jurors during voir dire about issues that they may be asked to consider. *See State v. Jones*, 339 N.C. 114, 136, 451 S.E.2d 826, 836-37 (1994) ("The purpose of *voir dir*e is to ferret out jurors with latent prejudices and to assure the parties' right to an impartial jury.").

N.C. Gen. Stat. § 1D-30 *requires* that the same jury try both the issues relating to compensatory damages and the issues relating to punitive damages, presumably for judicial economy reasons. *See* N.C. Gen. Stat. § 1D-30 (providing that "[t]he same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages"). As such, in the present case, Plaintiff had the right to question potential jurors regarding their *general* attitudes about alcohol

1. Defendant's objections to several of these questions were sustained by the trial court during *voir dire*. Consequently, Defendant would only be entitled to relief based on these questions if they, taken along with the totality of *voir dire*, resulted in an unfair trial. *See State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) ("In reviewing any *voir dire* questions, [our] Court examines the entire record of the *voir dire*, rather than isolated questions.").

and drunk driving in order to determine "whether a basis for challenge for cause exist[ed]" and to allow both parties to "intelligently exercise [their] peremptory challenges." *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995). Of course, the trial judge must exercise discretion in determining the extent and type of questioning permitted in order to protect the rights of all parties. *See Jones*, 339 N.C. at 134, 451 S.E.2d at 835 (stating that the "form of counsel's questions" and "the manner and extent of trial counsel's inquiries" are within the sound discretion of the trial court). We conclude that Plaintiff's questioning, which was general in nature and did not expressly state that Defendant had been intoxicated, was appropriate.

B. "Stake Out" Questions

Defendant argues that the trial court erred in permitting Plaintiff's attorney to ask improper "stake out" questions during *voir dire*. Defendant contends that the totality of Plaintiff's *voir dire* questioning biased the jury, resulting in an unfair trial. We disagree.

The purpose of jury *voir dire* is to "eliminate extremes of partiality and ensure that the jury's decision is based solely on the evidence presented at trial." *State v. White*, 340 N.C. 264, 280, 457 S.E.2d 841, 850 (1995). "The extent and manner of a party's inquiry into a potential juror's fitness to serve is within the trial court's discretion." *Id.* On appeal, we review the entire record of voir dire to determine "whether the trial court abused its discretion and whether that abuse resulted in harmful prejudice to the defendant." *State v. Cheek*, 351 N.C. 48, 66, 520 S.E.2d 545, 556 (1999).

A "stake out" question asks a juror to "pledge himself [or herself] to a future course of action" by asking what "verdict [the prospective juror] would render, or how they would be inclined to vote, under a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976). Our Supreme Court has held that stake out questions are generally improper:

> Counsel may not pose hypothetical questions which are designed to elicit from prospective jurors what their decision might be under a given state of facts. Such questions are improper because they tend to "stake out" a juror and cause him to pledge himself to a decision in advance of the evidence to be presented.

Id.

[1] On appeal, Defendant challenges numerous questions asked by Plaintiff's counsel during *voir dire*. We will address each line of questioning in turn.[2]

Defendant first takes issue with a hypothetical scenario presented by Plaintiff's counsel where counsel asked if the juror approached a red light late at night with no traffic nearby, would the juror "wait for it to change or [] go straight through it?" Although this question did involve a hypothetical set of facts, it was not a stake out question because the facts presented were not similar to the underlying facts of the case and did not ask jurors to state what kind of verdict they would render. *See State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Rather, this question addressed a "key criterion of juror competency" – whether jurors were inclined to follow the law. *See State v. Chapman*, 359 N.C. 328, 346, 611 S.E.2d 794, 810 (2005).

[2] Defendant next challenges Plaintiff's counsel's questions regarding jurors' attitudes toward awarding damages. Plaintiff's counsel first posed the question as follows:

> Which way do you lean? Are you a little closer to the folks who think that, in considering money, you should only consider the harms and losses or are you closer to folks who think you should factor in other things in determining how much money to include in your verdict?

The trial court overruled Defendant's first objection to this line of questioning, but after a bench conference, Plaintiff's counsel rephrased the question as follows:

> What trouble would you have, if you are instructed by the judge . . . that you are only to consider the harms and losses that are proven from the evidence[,] in following that instruction and only considering harms and losses and factoring out [] everything else?

Defendant's counsel also objected to this phrasing of the question. Even assuming that the first iteration of the harms and losses question was an inappropriate stake out question, we do not believe that it prejudiced Defendant. Only one juror responded to the first question before

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2. Defendant challenges several questions which she failed to object to during the trial. Because the trial court never had the opportunity to consider these issues, they are not properly before us on appeal. N.C. R. App. P. 10(b)(1); *State v. Nobles*, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

counsel rephrased it after the bench conference. The second iteration of the question was clearly an appropriate *voir dire* question intended to determine if jurors could follow the law as presented by the trial court. *See State v. Wiley*, 355 N.C. 592, 617, 565 S.E.2d 22, 40 (2002) (stating that the right to an impartial jury recognizes "that each side will be allowed to inquire into the ability of prospective jurors to follow the law"). Likewise, Plaintiff's question to the jury regarding whether they would have trouble putting money into a verdict for pain and suffering also sought to determine whether jurors could follow the law allowing damages for pain and suffering. *See* N.C. Gen. Stat. § 28A-18-2 (2015).

[3] Defendant also contends that Plaintiff's counsel improperly asked jurors whether they had lost someone who had provided "care" to them or to family members. This was clearly not a stake out question, and was appropriate in order to allow both parties to evaluate the fitness of each juror to serve on this particular jury. *See White*, 340 N.C. at 280, 457 S.E.2d at 850.

[4] Finally, Defendant contends that it was improper for Plaintiff's counsel to ask whether jurors thought DUI laws were too harsh or too lax. Prior to trial, the parties agreed that no questions would be asked which tended to tie Defendant to alcohol, but that Plaintiff could ask about alcohol-related issues so long as it was not too suggestive. This question appears to be an attempt by Plaintiff's counsel to gauge jurors' attitudes toward alcohol in general. This was not a stake out question to because it did not provide any facts of the case and did not ask jurors to state what their verdict would be under a given state of facts. *See Cheek*, 351 N.C. at 66-67, 520 S.E.2d at 556. While the issue of alcohol could perhaps have been approached more delicately, we do not believe that this question prejudiced Defendant, when reviewed in the context of the entire jury selection process.

After thorough review of the transcript of jury *voir dire* in this case, including the questions to which Defendant's objections were sustained, we are unable to find that the trial court abused its discretion during *voir dire* or that Defendant was prejudiced by the totality of the questions posed by Plaintiff's counsel. *See id.* Accordingly, this argument is overruled.

C. Jury Instructions

[5] Defendant's next argument involves the trial court's instruction of the jury. Specifically, Defendant argues that the trial court should not have given an instruction to the jury regarding pain and suffering damages because there was no evidence that the victim experienced

conscious pain and suffering. We conclude that the trial court did not commit reversible error regarding the challenged instruction.

Our wrongful death statute provides that pain and suffering damages are recoverable in a wrongful death action, N.C. Gen. Stat. § 28A-18-2(a)(2) (2015); however, such damages are only available where the evidence supports such an award. *See DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987) (stating that damages in a wrongful death action "must be proved to a reasonable level of certainty, and may not be based on pure conjecture"); *Brown v. Moore*, 286 N.C. 664, 672, 213 S.E.2d 342, 348 (1975) (noting that there is no basis for recovery of pain and suffering damages where injury and death occurred simultaneously). And when charging a jury in a civil case, the trial court "has the duty to explain the law and apply it to the evidence on the substantial issues of the action." *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994); *see also* N.C. Gen. Stat. § 1A-1, Rule 51. The trial court must instruct on a claim or defense "if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense." *Wooten*, 117 N.C. App. at 358, 451 S.E.2d at 347.

Here, the evidence at trial, viewed in the light most favorable to Plaintiff, did support a reasonable inference that the victim experienced conscious pain and suffering. For instance, three witnesses who were at the scene of the accident testified that the victim was "trying to breathe, and moaning" after being struck by Defendant's vehicle. The victim's treating physician testified that the injuries she sustained would be "severely painful" and that she responded to painful stimuli until her fourth day in the hospital. Based on this testimony, it could be reasonably inferred that the victim consciously experienced pain and suffering before her death, either immediately after the accident or during her hospitalization. Therefore, we conclude that the trial court did not err in instructing the jury on pain and suffering.

D. Witness Testimony

[6] Defendant next argues that the trial court improperly allowed individuals who were not heirs of the victim to testify regarding elements of loss of society and companionship damages. Specifically, Defendant contends that it was improper for the victim's cousin and one of her coworkers to testify regarding the victim's personality and demeanor, and for the co-worker to testify that she had discovered a pregnancy test in the victim's desk at the office. We disagree.

Damages recoverable for wrongful death include the value of "[s]ociety, companionship, comfort, guidance, kindly offices and advice of the decedent." N.C. Gen. Stat. § 28A-18-2(b)(4)(c). Our wrongful death statute further provides:

> All evidence which reasonably tends to establish any of the elements of damages in subsection (b) [of the statute], or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible[.]

N.C. Gen. Stat. § 28A-18-29(c). Our Supreme Court has noted that "personality and other traits relevant to what kind of companion" the decedent had been are relevant in a wrongful death action. *See DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494.

Plaintiff argues that this challenged evidence was clearly relevant to the jury's determination regarding the value of the victim's society, companionship, comfort, guidance, kindly offices, and advice pursuant to N.C. Gen. Stat. § 28A-18-2(b)(4)(c), and we can discern no error in its admission. In addition, Defendant has failed to make any argument as to how she was prejudiced by this evidence, in light of the fact that other witnesses testified similarly, and Defendant has not challenged this other evidence.

E. Deterrence Argument

[7] Defendant argues that pursuant to Chapter 1D, it is improper to make a "deterrence" argument during the compensatory phase of a bifurcated trial. We disagree. In short, the purpose of punitive damages is to "punish," N.C. Gen. Stat. § 1D-1; therefore, a "punishment" argument might have been inappropriate during the compensatory phase. However, another purpose of compensatory damages is to "deter" negligent behavior; therefore, Plaintiff's deterrence argument was not inappropriate.

Compensation of persons injured by wrongdoing is "one of the generally accepted aims of tort law." Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 13, at 389 (2d ed. 2011). However, "[c]ourts and writers almost always recognize that another [general] aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm." *Id.* § 14. Our Supreme Court has noted that "liability [itself] promotes care and caution." *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 13, 152 S.E.2d 485, 493 (1967). The possibility

of being found liable in tort and ordered to pay compensatory damages certainly acts to deter individuals from committing tortious conduct in the first instance. *See id.*

Under Chapter 1D, punitive damages may only be awarded if the plaintiff proves that the defendant is liable for compensatory damages *and* one of three aggravating factors is present. N.C. Gen. Stat. § 1D-15(a). These factors include "[w]illful or wanton conduct." N.C. Gen. Stat. § 1D-15(a)(3). In a bifurcated trial, "evidence relating *solely* to punitive damages" is not admissible until the trier of fact has determined whether compensatory damages are warranted and has set the amount of compensatory damages. N.C. Gen. Stat. § 1D-30. Clearly, counsel would not be permitted to reference any aggravating factor during her closing argument in the compensatory phase of a bifurcated trial; however, that is not the issue we are faced with in this case.

Based on Chapter 1D of our General Statutes, the guidance of our Supreme Court, and the long-established general purposes of tort law, we conclude that a *general* deterrence argument is appropriate during the compensatory phase of a bifurcated trial so long as it does not refer to any of the aggravating factors set forth in N.C. Gen. Stat. § 1D-15(a) or urge the trier of fact to punish the defendant.

Here, Plaintiff's counsel stated in closing that a purpose of the civil justice system was to "make people pay full and fair compensation . . . and[] not one penny more" in order to "enforce [] safety rules[.]" Plaintiff's counsel reiterated this argument as follows:

> If you[, the jury,] require less than full and fair compensation, . . . not only are you failing to compensate [Plaintiff] . . . for the harm that's been suffered but you're not creating a deterrent of *making people pay for the harm they cause, and not one penny more.*

These statements were a proper characterization of a purpose of compensatory damages. Plaintiff's counsel did not urge the jury to punish Defendant or "send her a message." Rather, counsel simply recounted the purposes of tort law and requested that the jury make Defendant pay for the "harm [she] cause[d], and not one penny more."

Accordingly, we hold that the trial court did not abuse its discretion by failing to sustain Defendant's objection. *See State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (noting the standard of review for improper closing arguments that provoke a timely objection).

F. Damage Award

[8] Finally, Defendant contends that the trial court should have granted her motion for a new trial based on the fact that the jury's $4.25 million *compensatory* damages verdict was excessive and against the manifest weight of the evidence. We disagree.

Rule 59 allows for the trial court to grant a new trial in the case of "excessive . . . damages appearing to have been given under the influence of passion or prejudice[,]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(6), or "insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). However, "[i]t is only when the jury has arbitrarily disregarded the law and the evidence that the judge must exercise [] judicial discretion and set the verdict aside." *Brown v. Moore*, 286 N.C. 664, 674, 213 S.E.2d 342, 349 (1975). And our Supreme Court has "held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict . . . is not subject to review on appeal in the absence of an abuse of discretion." *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967) (citing *Armstrong v. Wright*, 8 N.C. 93 (1820)).

Here, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for a new trial.

Defendant argues that the jury's relatively small *punitive* damage award of $45,000 is indicative that the jury did more than simply compensate Plaintiff in awarding $4.25 million in *compensatory* damages. Essentially, Defendant contends that the small punitive damage award is indicative that the jury included a measure of punishment in its compensatory award, not knowing that it would get the opportunity to award punitive damages in a second phase.

Regarding the large compensatory damage award, we note that our Supreme Court has recognized the difficulty of calculating the "monetary value of [a] decedent," stating that such a task "will usually defy any precise mathematical computation." *Brown*, 286 N.C. at 673, 213 S.E.2d at 348-49. Therefore, "the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury[.]" *Id.* at 674, 213 S.E.2d at 349. As for the small punitive damage award, we note that there was evidence that Defendant made very little money; therefore, it was not an abuse of discretion for the trial court to determine that the jury acted appropriately by finding that a $45,000 punitive damage award was an adequate punishment for this particular Defendant. In conclusion, we cannot say that the trial court abused its discretion in determining that

the compensatory award was appropriate. *See Worthington v. Bynum*, 305 N.C. 478, 486, 290 S.E.2d 599, 604 (1982).

III. Conclusion

For the foregoing reasons, we find that Defendant received a fair trial, free from prejudicial error. Accordingly, we affirm the trial court's denial of Defendant's motion for new trial pursuant to Rule 59.

AFFIRMED.

Chief Judge McGEE and Judge ZACHARY concur.

IN THE MATTER OF J.M. & J.M.

No. COA17-275

Filed 19 September 2017

1. Evidence—hearsay—admissions by party opponent

Evidence in an abused juvenile proceeding was hearsay but admissible as admissions of a party opponent where the mother testified about the father's actions. His actions had occurred in her presence and she was a party to the action filed by the Department of Social Services alleging abuse and neglect.

2. Evidence—hearsay—medical exception

Statements by a mother during a well baby checkup about the father's actions were hearsay but admissible in an abused juvenile proceeding. The two-month-old baby had marks on the neck and bloodshot eyes that were observed by the pediatrician, and the child was immediately sent to the emergency department of a hospital, where the mother disclosed the same information. The child was too young to talk and the declarant was not required to be the patient.

3. Child Abuse, Dependency, and Neglect—findings—supported by evidence

Certain findings in an abused juvenile proceeding were supported by the evidence, and others, or portions thereof, that were not supported by the evidence were not binding on the Court of Appeals. The binding findings of fact established that the child sustained multiple non-accidental injuries and that the father was responsible for the injuries.

4. Child Abuse, Dependency, and Neglect—adjudication—serious neglect

The trial court erred in an abused juvenile proceeding by adjudicating a child as "seriously neglected" due to inappropriate discipline by the father and inaction by the mother. The trial court used the wrong definition of "serious neglect." The definition the trial court used pertained to the responsible individuals list in N.C.G.S. § 7B-101(19a), rather than the definition pertaining to adjudication of neglect in N.C.G.S. § 7B-101(15).

5. Child Abuse, Dependency, and Neglect—reunification efforts ceased—statutory requirements not met

The statutory requirements for the cessation of reunification efforts in an abused juvenile proceeding were not met where dispositional and permanency planning matters were combined in a single order at the initial dispositional hearing. There was no indication that a previous court had determined that one of the aggravating factors in N.C.G.S. § 7B-901(c)(1) was present, and the trial court's order should have included written findings pertaining to those circumstances.

Appeal by Respondent-Father from order entered 21 November 2016 by Judge William A. Marsh, III in District Court, Durham County. Heard in the Court of Appeals 31 August 2017.

Office of the Durham County Attorney, by Senior Assistant County Attorney Cathy L. Moore, for Petitioner-Appellee Durham County Department of Social Services.

Assistant Appellate Defender Joyce L. Terres for Respondent-Appellant Father.

K&L Gates, by Erica R. Messimer, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Father appeals from an adjudication, disposition, and permanency planning order concluding that his son, J.M. ("the son"), was an abused juvenile; that his daughter, J.M. ("the daughter"), was a seriously neglected juvenile (together, "the children"); that it was in the children's best interests to remain in the custody of the Durham County Department of Social Services ("DSS"); and that DSS was not required

to employ reasonable reunification efforts with Respondent-Father. We affirm in part, reverse and remand in part, and vacate in part.

I. Background

DSS filed a petition on 11 September 2015, alleging that the son and the daughter were abused, neglected, and dependent children. At the time the petition was filed, the son was two months old and the daughter was nearly two years old. The petition alleged that the mother brought the son to a well-baby check-up on 8 September 2015, at which the examining health professional observed "marks" on the son's neck. The son was sent to UNC hospitals for further testing. The tests, including a "skeletal survey," revealed healing fractures to his ribs, tibia, and fibula; ear and tongue bruising; subconjunctival hemorrhages; and excoriation under the chin. The examination also revealed that the son had a history of poor weight gain due to "not being fed on a regular schedule."

The children's mother revealed to DSS that Respondent-Father had: (1) "flick[ed]" the son in the chin and had punched the son in the stomach; (2) excessively disciplined the daughter by, *inter alia*, hitting her with a back scratcher and hitting her in the mouth; (3) engaged in domestic violence with the mother in front of the children; and (4) smoked marijuana in the presence of the children. The petition further alleged that the mother and Respondent-Father each had mental health diagnoses and that the mother had borderline intellectual functioning. According to the petition, the children's maternal grandparents lived in New York but traveled to Durham on a regular basis to care for the children. DSS obtained nonsecure custody of the children on 11 September 2015, and the trial court sanctioned placement with the grandparents.

A hearing was held on DSS's petition on 12 July 2016, during which the trial court heard testimony from: (1) a nurse practitioner, who treated the son and was an expert in pediatrics and child maltreatment; (2) the children's maternal grandmother ("the grandmother"); and (3) a social worker supervisor familiar with the family's case. Following the hearing, the trial court entered a combined adjudication, disposition, and permanency planning order on 21 November 2016.

Relevant to the present appeal, the trial court found as fact that: (1) the mother had disclosed to the grandmother and medical professionals that Respondent-Father was too rough with the son; (2) the mother had witnessed Respondent-Father being abusive to the son; (3) the son's "skeletal surveys" showed healing fractures to his ribs, tibia, and fibula, bruising to his ear and tongue, subconjunctival hemorrhages,

and excoriation under his chin; (4) there was no history of falls or accidents to explain the son's injuries, and the injuries were consistent with instances described by the children's mother; (5) the mother witnessed Respondent-Father inappropriately disciplining the daughter; and (6) the mother was not forthcoming during a prior child protective services investigation. The trial court also found that, pursuant to a safety plan, the grandmother agreed to reside in the home with the mother and Respondent-Father agreed to move out. However, the mother subsequently recanted her statements and moved out of the home.

Based on these, and other, findings of fact, the trial court concluded the son was an abused juvenile and that the daughter was a "seriously neglected" juvenile. The trial court further concluded it was in the children's best interests to remain in DSS custody; that the permanent plan for the children should be guardianship, with an alternative plan of adoption; and that reasonable reunification efforts with the mother and Respondent-Father were no longer required. Respondent-Father appeals.[1]

II. Analysis

Respondent-Father argues the trial court erred by: (1) making several findings of fact that were not supported by competent evidence in the record or were improperly admitted hearsay statements; (2) concluding as a matter of law that the son was an abused juvenile; (3) concluding as a matter of law that the daughter was a "seriously neglected" juvenile; and (4) relieving DSS of its responsibility to make reunification efforts without following "any applicable statutory requirements."

A. Challenged Findings of Fact

Respondent-Father argues four of the trial court's findings of fact were improperly made because the evidence underlying those findings was inadmissible hearsay. In addition, Respondent-Father argues that four other findings of fact were unsupported by competent evidence in the record.

1. Hearsay

[1] Respondent-Father argues findings of fact 12 and 19 are unsupported by competent evidence because the testimony underlying the findings was inadmissible hearsay. These findings state:

1. The children's mother participated in the trial court proceedings, but is not a party to the present appeal.

> 12. During the week prior to Labor Day, the mother contacted her mother, [the grandmother] in New York, several times a day by phone and text to attempt to tell her something. Finally, the mother called [the grandmother], informing her that [Respondent-Father] was treating the children too rough; it was serious; she didn't know how to handle it and he was abusing them.
>
> . . . .
>
> 19. The children have been present during incidents of domestic violence between the parents. On one occasion, [mother] was holding [the son] in her arms and [Respondent-Father] hit her with a broom.

As Respondent-Father argues in his brief, the only competent evidence presented at the hearing to support these findings of fact was the testimony of the grandmother. The grandmother testified that the mother called and texted on numerous instances about "what was going on," and that whatever was going on was "serious." In one such conversation, which occurred in September 2015, the mother reported to the grandmother that she had been a victim of physical and sexual abuse at the hands of Respondent-Father, and that Respondent-Father "was hitting [the daughter] with a broomstick." The grandmother testified that the mother told her that both the son and the daughter were present during instances of domestic violence between Respondent-Father and the mother.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). Hearsay evidence is inadmissible unless an exception to the hearsay rule applies. N.C.G.S. § 8C-1, Rule 802. While we agree with Respondent-Father that this testimony, to which Respondent-Father properly objected, was hearsay, we find that the testimony was properly admitted under N.C.G.S. § 8C-1, Rule 801.

N.C.G.S. § 8C-1, Rule 801 provides, in relevant part:

> (d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested

> his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject[.]

N.C. Gen. Stat. § 8C-1, Rule 801(d) (2015). Respondent-Father argues that the party opponent exception does not apply in this instance, because the statements in question were made by the mother, not by him. He also submits that the mother did not make them in a representative capacity, and that he did not authorize or adopt her statements.

We are not persuaded by Respondent-Father's argument, as he appears to overlook the fact that the mother was also a party to the action, and her inaction was relevant to the issue of whether the children were abused or neglected. Our Supreme Court has stated that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

This Court addressed a nearly identical issue in *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989). In *Hayden*, the respondent-father objected to out-of-court statements made by the mother and, on appeal, he argued that the statements did not fit within the party-opponent exception to the hearsay rule. This Court rejected the respondent-father's argument in that case, and explained:

> At the hearing, the social workers were permitted to testify, over [the] respondent's objections, as to his wife's out-of-court statements to them that respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior. [The r]espondent argues that these statements should have been excluded under Rule 802 in that they are hearsay, not within any exception. We disagree. [The mother] was a party to this action which was brought to determine whether her child [ ] was abused and neglected. Her statements to the social workers about [respondent's] conduct can only be reasonably considered as admissions by her that [the juvenile] was subjected to conduct in her presence which could be found to be abusive and neglectful. Within the context of this juvenile petition case, we hold that her statements were properly admitted pursuant to the provisions of Rule 801(d).

Id. at 81, 384 S.E.2d at 560-61. Like the mother's statements in *Hayden*, in the present case the mother was a party to the action that was brought to determine whether the children had been abused or neglected, and her statements were "reasonably considered as admissions by her that [the juvenile was] subjected to conduct in her presence which could be found to be abusive and neglectful." *Id.* Therefore, the mother's statements were properly admitted pursuant to N.C.G.S. § 8C-1, Rule 801(d).

[2] Respondent-Father also challenges findings of fact 13 and 14 as only supported by inadmissible hearsay. These findings state:

> 13. On September 8, 2015, the mother brought [the son] to a well-baby check-up and expressed her concerns to the doctor that the father was too rough with the child. Marks on [the son's] neck and conjunctival hemorrhages (bloodshot eyes) were observed by the medical provider. [The son] was two (2) months old at the time. [The son] was sent to UNC Hospital Emergency Department for further testing.
>
> 14. The mother disclosed the same information to the Emergency Department doctor. A consult was requested from the Beacon Program which reviews cases of suspected child maltreatment. [The mother] repeated the same information to [nurse practitioner] Holly Warner from the Beacon Program, specifically that on separate occasions she had witnessed [Respondent-Father] flicking [the son] under the chin, holding him upside down by his ankles, and punching him in the stomach. Respondent-mother failed to take steps to adequately protect [the son].

As with findings of fact 12 and 19, Respondent-Father is correct that the testimony underlying findings of fact 13 and 14 were out-of-court statements made by the mother detailing Respondent-Father's alleged abuse of the son. The statements were made by the mother to physicians during a well-child visit and a subsequent emergency room visit. We conclude that, contrary to Respondent-Father's assertion, the testimony is a statement made for the purpose of medical diagnosis or treatment, an exception to the hearsay rule pursuant to N.C. Gen. Stat. § 8C-1, Rule 803. N.C.G.S. § 8C-1, Rule 803(4) provides, as relevant here:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

> (4) Statements for Purposes of Medical Diagnosis or Treatment.–Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2015).

Our Supreme Court has articulated a two-part inquiry to determine if testimony is admissible under the Rule 803(4) hearsay exception: "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). With respect to the first prong, our Supreme Court has stated that "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670.

In the present case, the record establishes that the statements in question meet both of the *Hinnant* requirements. The statements made by the mother to the physician were made during the son's well-child visit. Following that visit, the son was immediately sent to the UNC Hospital Emergency Department. At the hospital, the mother disclosed the same information to an ER physician and to a nurse practitioner. In each instance, we find the surrounding circumstances sufficient to show that the mother's statements were made for the purpose of medical treatment and diagnosis and were related to such treatment and diagnosis.

The first statement was made to a pediatrician at the son's regular two-month well-child visit. At the visit, the mother was concerned about the son's well-being, and the son's pediatrician observed marks on the son's neck and bloodshot eyes. The son's pediatrician apparently was concerned enough about the injuries that he sent the son to the ER on the same day. There, the mother again disclosed the information to a doctor and a nurse. In both instances, the statements were made to medical professionals in a hospital or medical clinic setting. At the time the statements were made, the extent of the son's injuries were not known, and medical professionals were attempting to diagnose them. A medical history and inquiry into these observations would have been part of any physician's attempt to diagnose the extent and cause of the

son's injuries. Therefore, we conclude that the statements satisfy both prongs of the *Hinnant* test.

Respondent-Father argues that the statements do not satisfy the Rule 803(4) exception because (1) the mother was not the patient, and (2) she made the statements to exculpate herself, not obtain treatment. North Carolina Courts have not considered whether N.C.G.S. § 8C-1, Rule 803(4) allows hearsay statements by persons other than the patient obtaining treatment. However, we agree with other jurisdictions, which have held that such testimony is admissible under Rule 803(4)'s hearsay exception. "Under the medical diagnosis exception to the hearsay rule, statements made by a patient for purposes of obtaining medical treatment are admissible for their truth because the law is willing to assume that a declarant seeking medical help will speak truthfully to medical personnel." *Galindo v. United States*, 630 A.2d 202, 210 (D.C. Ct. App. 1993). Like the District of Columbia Court of Appeals, "[w]e find no principled basis . . . not to apply the same rationale to a parent who brings a very young child to a doctor for medical attention; the parent has the same incentive to be truthful, in order to obtain appropriate medical care for the child." *Id.*; *see also Sandoval v. State*, 52 S.W.3d 851, 856-57 (Tex. Ct. App. 2001) ("[W]e conclude the fact that the information provided in the medical records came from complainant's mother does not affect the admissibility of the statements therein [under Rule 803(4)]. . . . In circumstances where the parent is giving the information to assist in the diagnosis and treatment of the child, we think the reliability of the statements is very high." (citation omitted)).

In the present case, we note that the son was only two months old at the time his injuries were discovered and was thus unable to talk. Nothing in the plain language of Rule 803(4) or in *Hinnant* requires the declarant to be the patient, and Respondent-Father's reading of the exception leads to an unworkable result — he would necessarily exclude any statements made in connection with medical diagnosis or treatment for any individual who is unable to speak. As DSS and the Guardian ad Litem ("GAL") point out, the mother's statements incriminate herself in addition to Respondent-Father, because they show she took no action to stop Respondent-Father or to protect the son. We perceive no limitation on allowing the parent of a child unable to relay his or her medical condition in the plain language of N.C.G.S. § 8C-1, Rule 803(4), and such an interpretation is not in conflict with our Supreme Court's guidance in *Hinnant*. We therefore conclude that the statements made by the son's treating physician fall within N.C.G.S. § 8C-1, Rule 803(4)'s exception to the hearsay rule, and were properly admitted.

2. Competent Evidence Determination

[3] Respondent-Father next challenges all or portions of findings of fact 7, 15, 17, and 18 as unsupported by competent evidence in the record. These challenged findings (or portions thereof) state:

> 7. The family received in-home services beginning in March 2015, due to a finding of improper care based upon the mother disclosing that the father hit [the daughter].
>
> . . . .
>
> 15. A skeletal survey showed that [the son] had healing right tibia and fibula fractures. The child also had ear bruising, sub conjunctival hemorrhages, excoriation under the chin and tongue bruising. There was no history of falls, accidents or injuries to explain the injuries. A follow-up skeletal survey two weeks later revealed healing rib fractures which were probably ten (10) days to two weeks old. [The son's] injuries were consistent with the instances described by the mother.
>
> . . . .
>
> 17. [The daughter], had not had a physical examination since the February 2015 CME [complete medical examination].
>
> 18. [The mother] witnessed [Respondent-Father] inappropriately disciplining [the daughter] by hitting her with a back scratcher leaving marks, slapping and hitting her in the mouth, and during one incident slapping [the daughter's] face so that her head hit the wall. The mother did not intervene to protect [the daughter] during any of these incidents.

Review of a trial court's adjudication of dependency, abuse, and neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied sub nom*, *Harris-Pittman v. Nash County Dept. of Social Servs.*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings."

In re Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted).[2]

As to finding of fact 7, Respondent-Father argues that DSS provided services based only on a "report," but that no one actually determined the cause of the daughter's injury before services were provided. Therefore, Respondent-Father argues, the finding is unsupported by the evidence. We disagree. The children's grandmother testified that DSS became involved in the children's lives after an incident in which Respondent-Father "had slapped [the daughter] in the eye" for no reason. The grandmother further testified that, while she was on the telephone with the mother one evening, she overheard an incident of domestic violence wherein Respondent-Father held a knife to the mother's throat. The grandmother testified that she called 911 and remained on the line with the mother until the police arrived at the scene.

In addition, a DSS social worker offered testimony that contact between DSS, the mother, and Respondent-Father began in February 2015 when "[DSS] received the report that [Respondent-Father] had slapped [the daughter] in the face resulting in injury to her eye." DSS assessed a "substantiation of improper care," and the case was transferred to "in-home services within [DSS] to continue to work with the family and identify needs." We hold that this testimony serves as competent evidence to support the challenged finding of fact, which is therefore conclusive on appeal. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

As to finding of fact 15, Respondent-Father challenges the portion that states a follow-up "skeletal survey" was completed two weeks after the initial skeletal survey. Respondent-Father contends the follow-up survey was actually completed three weeks after the initial survey, and he argues the difference is significant, because it suggests that some of the son's injuries occurred after Respondent-Father had moved out of the family home and had no contact with the children. Therefore, he argues the one-week difference tends to prove that he did not abuse the son.

Respondent-Father is correct in his assertion that the two skeletal surveys were three weeks apart, not two weeks apart, as the trial court

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2. Appellees have filed a joint brief, in which they first argue that Respondent-Father's appeal should be dismissed because it is moot. We find their arguments to be without merit and decline to address them.

found. The medical records in the record establish that the first occurred on 9 September 2015 and the second occurred exactly 21 days later, on 30 September 2015. However, we reject Respondent-Father's argument that the time difference suggests he could not have been responsible for some of the son's injuries. His theory is based on testimony from Holly Warner ("Warner"), the nurse practitioner who treated the son after he was referred to UNC Hospital. She testified as follows:

> When a rib fracture has just occurred, it's a very small fracture in the rib, and therefore, they're often not -- you're not able to see it at all until it starts to heal, so -- which is about seven to 14 days, depending on which radiologist you ask and the age of the child.

Respondent-Father argues that, if the rib fracture detected on 30 September 2015 was seven to fourteen days old, the injury would have occurred between 16 and 23 September 2015, by which time he had no contact with the children.

Respondent-Father suggests Warner definitively stated that the fracture was seven to fourteen days old, but in reality, Warner hedged her testimony as to the age of fracture, and offered a general time frame. Warner's main point was that "oftentimes a fracture can be present but you cannot see it until it starts to heal." She then stated: "So if there is healing, the fracture is thought to be *at least* ten to 14 days old." (emphasis added). Using the term "at least" suggests a fracture could be more than fourteen days old when it is detected by a radiologist. Furthermore, as DSS and the GAL note, the overarching theme is that the son suffered multiple fractures that were in multiple stages of healing. We hold the portion of finding of fact 15 that states the son's two skeletal surveys occurred two weeks apart to be unsupported by competent evidence, and we are not bound by that portion of the finding. However, we reject Respondent-Father's argument as to finding of fact 15 in all other respects.

Respondent next challenges finding of fact 17 as unsupported by competent evidence. Respondent-Father, DSS, and the GAL all agree that this finding is erroneous. The evidence presented at the hearing showed the daughter had at least one physical examination after February 2015. We therefore are not bound by finding of fact 17. *See In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

Finally, Respondent-Father challenges finding of fact 18, which details Respondent-Father's improper discipline of the daughter, as unsupported by competent evidence. The details of Respondent-Father's

improper discipline of the daughter were memorialized in a Complete Medical Evaluation ("CME") that was completed on the daughter in September 2015. The CME was introduced into evidence at the hearing, and it appears that none of the parties objected to its introduction. Therefore, we consider the CME to be competent evidence. *See In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753-54 (2009) (holding that where the parties failed to raise an objection on hearsay grounds at trial, any objection was waived and the testimony in question must be considered competent evidence). Although the CME does not reference the daughter's being hit with a "back scratcher,"[3] the remainder of this finding is supported by the CME. We conclude that the portion of finding of fact 18 mentioning a back scratcher is not supported by competent evidence. However, the remainder of the finding, which details Respondent-Father's abuse of the daughter, is supported by competent evidence.

III. Adjudication of the Son as an Abused Juvenile

Next, we turn to Respondent-Father's challenge to the trial court's conclusion that the son was an abused juvenile. An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1) (2015). Respondent-Father's argument essentially rests on his challenges to various findings of fact that we rejected in the previous section. Respondent-Father argues that, without the challenged findings of fact, there is no support for the trial court's conclusion that the son was abused.

As discussed above, we have rejected Respondent-Father's challenges to a majority of the findings of fact. The binding findings of fact establish that the son sustained multiple non-accidental injuries and Respondent-Father was responsible for the injuries. This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained. *See In re C.M.*, 198 N.C. App. 53, 60-62, 678 S.E.2d 794, 798-99 (2009) (affirming abuse where the findings of fact established that the juvenile sustained a head injury that doctors testified was likely non-accidental, despite

3. Details of the back scratcher incident apparently originate from the argument of DSS's attorney at the hearing. During her opening and closing arguments, DSS's attorney asserted that the CME "talks about an incident with [the daughter] being hit with a back scratcher."

being unable to specify when or how the injury occurred); *In re T.H.T.*, 185 N.C. App. 337, 345-46, 648 S.E.2d 519, 525 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (affirming adjudication of abuse where a juvenile sustained a non-accidental skull fracture and other injuries, the juvenile was in the physical custody of the mother, the mother's explanations were not consistent with the injuries, and the mother failed to seek prompt medical attention). Given the binding findings of fact in the present case, we hold the trial court did not err in concluding that the son was an abused juvenile.

IV. Adjudication of "Serious Neglect"

[4] Next, Respondent-Father argues the trial court erred in concluding that the daughter was "seriously neglected." He contends that "seriously neglected" is not a statutory term used for adjudication pursuant to the juvenile code, and that "serious neglect" pertains only to a parent's placement on the responsible individuals' list, which is not at issue here. Therefore, he argues, the trial acted under a misapprehension of the law. We agree.

N.C. Gen. Stat. § 7B-101(15) defines a neglected juvenile as

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). A separate section of the juvenile code authorizes the North Carolina Department of Health and Human Services ("DHHS") to "maintain a central registry of abuse, neglect, and dependency cases," and also authorizes DHHS to "maintain a list of responsible individuals." N.C. Gen. Stat. § 7B-311(a)-(b) (2015). The juvenile code defines "responsible individuals" as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile," and defines "serious neglect," in turn, as:

> Conduct, behavior, or inaction of the juvenile's parent, guardian, custodian, or caretaker that evidences a disregard of consequences of such magnitude that the conduct, behavior, or inaction constitutes *an unequivocal danger*

> *to the juvenile's health*, *welfare*, *or safety*, but does not constitute abuse.

N.C. Gen. Stat. § 7B-101(18a), (19a) (2015) (emphasis added).

In the present case, the trial court found the daughter to be "a child who is seriously neglected[] due to inappropriate discipline by [Respondent-Father] and inaction by the mother which constituted *an unequivocal danger to [the daughter's] health*, *welfare or safety*." (emphasis added). As Respondent-Father contends, the trial court used the term "serious neglect" and also employed the statutory language of N.C.G.S. § 7B-101(19a). The term "serious neglect" pertains only to placement of an individual on the responsible individuals' list and is not included as an option for adjudication in an abuse, neglect, or dependency action. The term is not used in any statutory section governing adjudicatory actions. *See* N.C. Gen. Stat. §§ 7B-200 (jurisdiction), -401(a) (pleadings), -802 (adjudicatory hearing), -805 (quantum of proof at adjudication).

It appears the trial court was acting under a misapprehension of the law — the trial court used the definition of "serious neglect" in N.C.G.S. § 7B-101(19a), pertaining to the responsible individuals' list, as opposed to the definition of "neglect" in N.C.G.S. § 7B-101(15), pertaining to an adjudication of neglect. Therefore, we reverse the trial court's adjudication of "serious neglect" and remand the case for the trial court's consideration of neglect within the proper statutory framework. *See Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960) ("[W]here it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the superior court for further hearing in the true legal light.") (internal quotation marks and citation omitted).

V. Reunification Efforts

[5] Finally, Respondent-Father argues the trial court erred in relieving DSS from making further reunification efforts without following any applicable statutory requirements. We agree. After the trial court concluded the adjudication hearing, it proceeded to a combined disposition and permanency planning hearing. The parties do not dispute the trial court's authority to combine the hearings, or its authority to address both initial disposition and permanency planning in a single order. Rather, Respondent-Father only argues that the trial court failed to follow the statutory requirements before relieving DSS of further reunification efforts.

N.C. Gen. Stat. § 7B-901(c) authorizes the elimination of reunification efforts at an initial disposition under limited circumstances. N.C.G.S. § 7B-901(c), as relevant to the present case, provides:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> (1) A court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
> b. Chronic physical or emotional abuse.
> c. Torture.
> d. Abandonment.
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

N.C. Gen. Stat. § 7B-901(c) (2015). In *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d 274 (2016), this Court interpreted N.C.G.S. § 7B-901(c), and concluded that, in order for a court to cease reunification efforts at the initial disposition hearing, "the dispositional court must make a finding that [a] court of competent jurisdiction has determined that the parent allowed one of the aggravating circumstances to occur." *Id.* at ___, 791 S.E.2d at 279. Relying upon the use of the phrase "has determined" in the statute, this Court elaborated:

> [It] is clear and unambiguous and that in order to give effect to the term "has determined" [in N.C.G.S. § 7B-901(c),] it must refer to a prior court order. The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have

> already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court. The legislature's use of the term "court of competent jurisdiction" also supports this position. Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.

Id. "Thus," the Court concluded, "by our plain reading of the statute, if a trial court wishes to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1)[], it must make findings at disposition that a court of competent jurisdiction *has already determined* that the parent allowed the continuation of" one of the situations enumerated in N.C.G.S. § 7B-901(c)(1). *In re G.T.* at ___, 791 S.E.2d at 279 (emphasis added); *see also* N.C.G.S. §§ 7B-901(c)(1)(a)–(f).

In the present case, the trial court's order does not cite to N.C.G.S. § 7B-901(c). However, because the trial court ceased reunification efforts in an order entered following an initial disposition hearing, N.C.G.S. § 7B-901(c) was necessarily implicated. The trial court's order concluded that "[r]eunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. Durham DSS should be relieved of further efforts to eliminate the need for the children to live outside the home." This conclusion was based on a finding using the same wording. Notably absent from the trial court's disposition is any finding indicating that a previous court had determined one of the aggravating factors to be present. *See* N.C.G.S. § 7B-901(c)(1). The trial court's finding of fact is insufficient to cease reunification efforts at an initial disposition hearing; under *In re G.T.*, ___ N.C. App. at ___, 791 S.E.2d at 279, the trial court's order was required to include a finding "that a court of competent jurisdiction ha[d] already determined that" one of the circumstances listed in N.C.G.S. § 7B-901(c) was present. No court of competent jurisdiction had made such a determination and, even if it had, the trial court did not make the required finding.

We recognize that the trial court's initial disposition order in the present case also served as its permanency planning order. N.C. Gen. Stat. § 7B-906.2(b) permits a trial court to cease reunification efforts following a permanency planning hearing:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a

> primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that *reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.*

N.C. Gen. Stat. § 7B-906.2(b) (2015) (emphasis added). DSS and the GAL argue, and it appears, that the trial court was attempting to follow the requirements of N.C.G.S. § 7B-906.2(b) in ceasing reunification efforts, as the trial court's finding and conclusion that eliminated reunification efforts track the language of that section. Notwithstanding the trial court's effort, the plain statutory language of N.C.G.S. § 7B-901(c) requires a trial court entering an initial dispositional order that places a juvenile in the custody of a county department of social services to "direct that reasonable efforts for reunification . . . shall not be required" only if the trial court "makes written findings of fact pertaining to" any of the circumstances listed in N.C.G.S. § 7B-901(c)(1)(a)-(f).

We find no merit in the argument that the clear command of N.C.G.S. § 7B-901(c) may be eluded in favor of the more lenient requirements of N.C.G.S. § 7B-906.2(b) simply by combining dispositional and permanency planning matters in a single order. Because the requirements of N.C.G.S. § 7B-901(c) were not met in the present case, and consistent with *In re G.T.*, we vacate that portion of the trial court's order that released DSS from further reunification efforts.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART; VACATED IN PART.

Judges DIETZ and INMAN concur.

IN RE N.H.

[255 N.C. App. 501 (2017)]

IN THE MATTER OF N.H.

No. COA17-171

Filed 19 September 2017

Guardian and Ward—appointment of guardian—financial resources

In a guardianship proceeding for a minor child, the trial court's finding that that the finances of the child's aunt were sufficient to care for the child was supported by the testimony of the aunt, who worked as a school bus driver. Her testimony could have been more specific, but her sworn statement that she was willing to care for the child and possessed the financial resources to do so constituted competent evidence. The standard of review merely asks if there was competent evidence to support the findings.

Judge DILLON concurring in a separate opinion.

Judge DAVIS dissenting.

Appeal by respondent-mother from order entered 21 November 2016 by Judge Susan M. Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 24 August 2017.

No brief filed for petitioner-appellee Buncombe County Department of Social Services.

David A. Perez, for respondent-appellant mother.

Amanda Armstrong, for guardian ad litem.

CALABRIA, Judge.

Respondent appeals from an order granting guardianship of her minor child, N.H. ("Nancy"), to her sister, K.P. ("Ms. Parker").[1] We hold that there was evidence before the trial court that Ms. Parker has adequate resources to care appropriately for Nancy, and therefore that the trial court did not err in awarding guardianship of Nancy to Ms. Parker.

1. Pseudonyms are used throughout to protect the juvenile's privacy and for ease of reading.

I. Factual and Procedural Background

The Buncombe County Department of Social Services ("DSS") initiated the underlying juvenile case on 23 March 2016, when it filed a juvenile petition alleging Nancy was an abused and neglected juvenile based on allegations that she had been sexually abused by respondent's former roommates, concerns of possible drug use by respondent, and concerns of domestic violence in the home. DSS did not seek non-secure custody of Nancy, because she was in a safety resource placement. On 15 April 2016, Nancy was transferred to the care of Ms. Parker, and she has remained in Ms. Parker's care throughout the case.

After a hearing on 6 July 2016, the trial court entered an order on 22 July 2016, adjudicating Nancy to be an abused and neglected juvenile. According to the order, Nancy remained in the legal custody of respondent and Nancy's father, but Nancy's safety resource placement continued with Ms. Parker. The court granted respondent weekly supervised visitation with Nancy and ordered that Nancy continue to be involved with outpatient mental health therapy. Additionally, the court ordered respondent to: (1) be involved in mental health treatment; (2) follow the therapist's recommendations; (3) follow up with the recommendations of her comprehensive clinical assessment; (4) participate in Nancy's therapy; (5) submit to random drug testing; and (6) complete a medication evaluation and follow all recommendations.

On 6 September 2016, the trial court conducted the initial permanency planning and review hearing in this case. In its order from the hearing, entered 21 November 2016, the court set the primary permanent plan for Nancy as guardianship and set the secondary plan as reunification with her parents. The court awarded guardianship of Nancy to Ms. Parker, granted respondent weekly supervised visitation with Nancy, and directed DSS to continue to work toward Nancy's reunification with her parents. Respondent filed timely notice of appeal from the trial court's order awarding guardianship of Nancy to Ms. Parker.

II. Verification of Guardian's Resources

Respondent's sole argument on appeal is that the trial court erred in failing to properly verify that Ms. Parker's resources were adequate to provide Nancy appropriate care as her guardian. We disagree.

A. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law." *In re R.A.H.*,

182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation and quotation marks omitted). Before a trial court may appoint a guardian of the person for a juvenile in a Chapter 7B case, the court must "verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2015), *see also* N.C. Gen. Stat. § 7B-906.1(j) (2015) (requiring an identical verification when appointing a guardian of a person for a juvenile as part of the juvenile's permanent plan). "[T]he trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, . . . [but] some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence." *In re P.A.*, 241 N.C. App. 53, 61-62, 772 S.E.2d 240, 246 (2015). "The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c).

B. Analysis

With regard to the adequacy of Ms. Parker's resources to care for Nancy as her guardian, the trial court found:

> 28. [Ms. Parker was] present at this hearing. Pursuant to N.C.G.S. § 7B-600(b), the Court questioned [Ms. Parker] and she understand[s] the legal significance of being appointed the minor child's guardian, and she has adequate resources to care appropriately for the minor child, and [is] able to provide proper care and supervision of the minor child in a safe home.

However, on appeal, respondent contends that there was no evidence presented to the trial court to support such a finding. For example, respondent notes that Ms. Parker "testified as to her employment with Buncombe County Schools Transportation, but she did *not* testify as to her actual income, whether she was paid a salary or worked by the hour, whether she received any job benefits, nor any other specifics regarding her employment other than she had no other source of income." Respondent notes various financial assets which Ms. Parker may or may not have had, and the fact that no testimony was elicited with respect to such hypothetical resources.

We acknowledge that our case law addresses this situation from numerous angles, none of them precisely on point. For example, in *In re N.B.*, guardians testified about their willingness to take responsibility,

there was a report stating the guardians were willing and able to provide care, and the social worker spoke "in depth" with the guardians about the requirements and responsibilities of being guardians. We held that this was adequate evidence pursuant to N.C. Gen. Stat. § 7B-906.1. *In re N.B.*, 240 N.C. App. 353, 361-62, 771 S.E.2d 562, 568 (2015). By contrast, in *In re P.A.*, where the only evidence was an unsworn statement by the guardian that the guardian had the ability to support the juvenile, we held that this was insufficient. *P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248. Likewise, in *In re J.H.*, where there was a report in evidence but the proposed guardians did not testify, we held that this was insufficient. *In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 240 (2015).

In the instant case, there are two GAL reports and one DSS report in the record, and Ms. Parker was present in court and offered testimony. The first GAL report, dated 30 June 2016, notes that Ms. Parker "is employed with the school district[,]" but makes no other observations about Ms. Parker's resources. The second GAL report, dated 1 September 2016, notes that Ms. Parker "is employed as a school bus driver for the school district," and that Ms. Parker "is a single mom with no income when she is not driving a school bus during the summer[,]" but otherwise makes no other observations about Ms. Parker's resources. The DSS report, also dated 1 September 2016, notes that respondent has given Ms. Parker a total of $30 when Ms. Parker experienced "significant financial difficulties[,]" that DSS has provided Ms. Parker with "gift cards of $30 per month to assist with purchasing food and gas[,]" and that Ms. Parker "has experienced financial difficulties in this process[,]" but makes no specific findings as to Ms. Parker's resources aside from these.

At trial, Ms. Parker was questioned about her resources. Although she was not specifically questioned about her salary or benefits, her examination was still thorough:

> Q. Okay. And so you're willing to be legally responsible for meeting all [Nancy]'s needs until she's 18 years old, is that correct?
>
> A. Yes.
>
> Q. And you understand that that means you would [be] responsible for meeting her medical needs, her dental needs, her psychological needs, her educational needs, and any other needs until she's 18, correct?
>
> A. Yes.

Q. And you're comfortable with that?

A. Yes.

. . .

Q. Do you work outside the home?

A. Yes.

Q. Where do you work?

A. Buncombe County Schools Transportation.

Q. Okay. And do you have any other source of income?

A. No.

Q. After you are paid every month, do you have sufficient money to cover all of your household bills?

A. Yes.

Q. And after you pay all of your bills, do you have money left over to cover groceries and any other needs?

A. It depends on what bills, but yes, we make it.

Q. Have you ever been a position where you didn't have enough money to pay all the bills related to housing, food, medical, transportation?

A. Over this past summer, yes, because I wasn't able to be employed with the intense home therapy and stuff, but I did manage to save up money and it go[t] me through almost all of the summer. So---

Q. Why weren't you able to be employed over the summer?

A. Due to the nonapproved child care for [Nancy], I didn't have no one to leave her with.

Q. Okay. So you were unable to be employed this summer because you were caring for [Nancy]?

A. Yes. And then whenever she started intense home therapy, it's a requirement three to five days a week [inaudible]. I have to be involved in that.

Q. Okay. And you mentioned you were able to save up money to get you through the summer?

A. Yes.

Q. Okay. And if the Court were to award guardianship to you, what would be your plan for next summer?

A. Save up.

Q. Okay. So now that you -- this summer you would be aware that you would not be able to be employed and you can save up throughout the year to cover your expenses during the summer?

A. Yes.

Q. Do you feel---

A. It was -- it was more difficult because I had transitioned -- I worked at a gas station and transitioned into the Buncombe County Transportation in, I think, March -- at the end of March, and then I got [Nancy] and kind of put it on halt.

Q. Okay.

A. My plan was to have a summer job, so---

Q. Okay. Do you anticipate that you will have sufficient financial income to cover all of your expenses even during the summertime when you're not employed?

A. Yes.

Q. Okay. If you were to find that -- say, for example, you ran out of money and needed financial assistance, do you have family that you could go to ask for help?

A. Yes.

Q. Okay. And would you be willing to do that if you had to?

A. Yes.

Q. And would you also know to reach out to the Department or other community resources to seek help if you needed to?

A. Yes.

Certainly, the statements in the GAL and DSS reports, as well as Ms. Parker's own testimony that she had financial difficulties over the

summer, would constitute evidence that Ms. Parker lacked the resources to care for Nancy. However, our role on appeal is not to weigh and compare the evidence; our standard of review merely asks if there was competent evidence, even hearsay evidence, at trial to support the trial court's findings.

We hold that this matter is distinguishable from *In re P.A.*, in which the only evidence was an unsworn statement by the guardian that the guardian had the ability to support the juvenile, and from *In re J.H.*, in which the proposed guardians did not testify. In this case, there is sworn testimony by Ms. Parker regarding her ability to provide appropriate care for Nancy.

While Ms. Parker's testimony appears to be the only evidence in the record to support her having adequate resources to provide appropriate care for Nancy, it is nonetheless evidence in the record. No challenge was raised at trial with respect to this evidence, nor did any party attempt to contradict or impeach Ms. Parker's testimony. In fact, in respondent's attorney's closing arguments, counsel did not advocate *against* Ms. Parker being awarded guardianship, but rather *in favor of* reunification with respondent. We hold that, although Ms. Parker's testimony was lacking in specificity, her sworn statement that she was willing to care for Nancy and possessed the financial resources to do so constituted competent evidence, which in turn supported the trial court's finding that she "has adequate resources to care appropriately for the minor child[.]"

AFFIRMED.

Judge DILLON concurs in a separate opinion.

Judge DAVIS dissents in a separate opinion.

DAVIS, J., dissenting.

Because I believe the majority's opinion is inconsistent with both the statutory provision at issue and the relevant prior opinions of this Court, I respectfully dissent. The only issue in this appeal is whether the trial court erred in failing to properly verify that Ms. Parker possessed the financial resources necessary to adequately care for Nancy. Subsection (j) of N.C. Gen. Stat. § 7B-906.1 states that

> [i]f the court determines that the juvenile shall be placed in the custody of an individual other than a parent or

> appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and *will have adequate resources to care appropriately for the juvenile.*

N.C. Gen. Stat. § 7B-906.1(j) (2015) (emphasis added).

This Court has held that in order to meet this verification requirement, "the record must contain competent evidence of the guardians' financial resources and their awareness of their legal obligations." *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 240 (2015) (citation omitted). "The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c) (2015). Such evidence may include reports and home studies conducted by the guardian *ad litem* ("GAL") or department of social services ("DSS"). *In re J.E.*, *B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73, *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007).

It is instructive to examine prior decisions in which this Court has concluded that the verification requirement contained in N.C. Gen. Stat. § 7B-906.1(j) was not satisfied. *In re P.A.*, 241 N.C. App. 53, 772 S.E.2d 240 (2015) involved a trial court's award of guardianship of the minor child to his father's girlfriend, "Ms. Smith." At the permanency planning hearing, Ms. Smith was asked if she had (1) "the financial and emotional ability to support this child and provide for its needs"; (2) "the willingness to reach out when your resources are running out"; and (3) the "prepared[ness] to support this minor child . . . ." *Id.* at 59-60, 772 S.E.2d at 245. She answered "yes" in response to each of these questions. *Id.*

On appeal, the respondent-mother argued that "the trial court [had] failed to verify that Ms. Smith had adequate resources to care appropriately for [the minor child] . . . ." *Id.* at 58, 772 S.E.2d at 245. We agreed, holding that Ms. Smith's conclusory answers alone were "insufficient to support the trial court's finding . . . ." *Id.* at 60, 772 S.E.2d at 245. We observed that the record did not present actual evidence of Ms. Smith's financial resources, but instead presented "Ms. Smith's own opinion of her abilities." *Id.* at 65, 772 S.E.2d at 248. Because her opinion as to her ability to care for the child was not sufficient to show that she actually had adequate resources to care for him, we ruled that "[t]he trial court ha[d] the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to

the potential guardian are in fact 'adequate.' " *Id.* (citation, quotation marks, and brackets omitted). We further stated that although the verification requirement under N.C. Gen. Stat. § 7B-906.1(j) does not mandate "detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources[,]" this statute does require "some evidence of the guardian's 'resources' . . . as a practical matter, since the trial court cannot make any determination of adequacy without evidence." *Id.* at 61-62, 772 S.E.2d at 246.

On several other occasions, we have likewise rejected a trial court's determination that a prospective guardian possessed adequate resources for purposes of N.C. Gen. Stat. § 7B-906.1(j). In *J.H.*, the juvenile had been previously placed with his maternal grandparents at the time the trial court entered a permanency planning order awarding guardianship to the grandparents. At the hearing, the court was presented with reports from both the DSS and the GAL. *J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (2015). The DSS report stated that the grandparents had met all of the child's "well-being needs" and "medical needs[,]" including "making sure that he has his yearly well-checkups." *Id.* at __, 780 S.E.2d at 240 (quotation marks omitted). The GAL report stated that the child "had no current financial or material needs." *Id.* at __, 780 S.E.2d at 240 (quotation marks omitted). The reports also showed that the grandparents had custody of the minor child's sister. Based on these reports alone, the trial court found that the grandparents had adequate resources to care for the child. *Id.* at __, 780 S.E.2d at 240.

On appeal, this Court vacated the trial court's order and remanded on the ground that the evidence contained in these reports was "insufficient to support a finding that [the minor child's] grandparents have adequate resources to care for [him]." *Id.* at __, 780 S.E.2d at 240 (citation and quotation marks omitted). In so holding, we stated that "[t]he trial court . . . failed to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate." *Id.* at __, 780 S.E.2d at 240 (citation and quotation marks omitted).

Similarly, in *In re T.W.*, __ N.C. App. __, 796 S.E.2d 792 (2016), we held that the trial court erred in awarding legal custody to the minor child's aunt because it had not verified that she would have adequate resources to care for the child. At the permanency planning hearing, the aunt testified that "she had yet to find employment and was just continuously looking for jobs" and had received "additional support and assistance" from her mother and grandmother so as to enable her to provide care for the juvenile. *Id.* at __, 796 S.E.2d at 798. The trial court received

a GAL report that described the aunt's home as "very clean" and stated that the child would have "his own room." *Id.* at __, 796 S.E.2d at 798. However, we determined that this evidence did not support the trial court's finding that the aunt had adequate resources to care for the child. We stated that "vague assurances do not suffice to allow an independent determination by the court, based upon the facts in the particular case, that the resources available to the potential custodian are in fact 'adequate' for purposes of N.C. Gen. Stat. § 7B-906.1(j)." *Id.* (citation and quotation marks omitted).

In the present case, the only witness who testified at the 6 September 2016 permanency planning hearing on this issue was Ms. Parker herself. She testified that she had previously been employed as a bus driver during the prior school year. She stated, however, that she had been unable to obtain employment during the summer of 2016 because she had to participate in Nancy's intensive home therapy and other needs. She further conceded that her lack of employment during the summer months had resulted in her not having enough funds to pay all of her bills. She stated that she had been able to save up some money, which got her "through almost all of the summer."

Nevertheless, she answered in the affirmative when asked (1) whether she would have "sufficient financial income to cover all of [her future] expenses"; (2) whether she "ha[d] family that [she] could go to ask for help"; and (3) whether she would "know to reach out to [DSS] or other community resources to seek help if [she] needed to." In addition, she stated that her future plan for the following summer would be to "[s]ave up" and that she anticipated she would have sufficient income to cover her expenses next summer.

Rather than demonstrating that N.C. Gen. Stat. § 7B-906.1(j) had been satisfied, both Ms. Parker's testimony and the reports prepared by DSS and the GAL supported the opposite conclusion — that she *lacked* the financial resources to care for Nancy. Ms. Parker did not testify as to her actual income, her job benefits, or any other specific information regarding her finances. Moreover, she did not specify the amount of money she was lacking to pay her bills during her financial shortfall during the summer of 2016.

The DSS and GAL reports unambiguously showed that Ms. Parker has struggled financially while caring for Nancy. The GAL's report stated that Ms. Parker had a problem with transporting Nancy to visits, because she "is a single mom with no income when she is not driving a school bus during the summer." The report prepared by DSS further stated, in pertinent part, as follows:

> [Ms. Parker] had to cancel a recent orthopedic appt. due to transportation difficulties . . . .
>
> . . . .
>
> [Ms. Parker] has experienced financial difficulties in this process as she has provided transportation for the child for visitations, mental health appointments, physician appointments, school registration, etc. as well as providing for the minor child's basic needs.
>
> . . . .
>
> Respondent mother has given the caregiver, [Ms. Parker], a one[-]time amount of $20 followed recently by a $10 support during times when [Ms. Parker] has experienced significant financial difficulties. . . .
>
> . . . .
>
> . . . The agency has provided the caregiver, [Ms. Parker], with gift cards of $30 per month to assist with purchasing food and gas. . . . [Social Worker] Banks made [a] referral to the Bair Foundation which has offered [Ms. Parker] some assistance with school supplies.

This evidence — in addition to Ms. Parker's own testimony about her lack of funds — demonstrated that Ms. Parker lacked the resources necessary to act as Nancy's guardian. As stated above, her own opinion of her future ability to financially care for Nancy, without more, was insufficient to support the court's finding that she possessed adequate resources as required under N.C. Gen. Stat. § 7B-906.1(j). *See In re P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248.

It is important to note that this is not a case in which there was conflicting evidence on this issue as to which it was the trial court's duty to weigh. To the contrary, the *only* evidence other than Ms. Parker's vague assurances showed that she has struggled to make ends meet. N.C. Gen. Stat. § 7B-906.1(j) clearly requires that before a person is appointed as guardian for a juvenile competent evidence must be presented that the prospective guardian will actually have adequate resources to take care of the child's needs. Here, such evidence simply was not presented to the trial court.

For these reasons, I would hold that the trial court's finding that Ms. Parker "has adequate resources to care appropriately for the minor child" is unsupported by the competent evidence presented at the

permanency planning and review hearing and that the trial court's order must be vacated. Accordingly, I dissent.

DILLON, Judge, concurring.

In this matter, the trial court entered an order granting Ms. Parker guardianship over N.H. Our General Assembly requires that a trial court considering the appointment of a guardian must first verify that the potential guardian "*will have* adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-906.1(j) (emphasis added). The sole issue here is whether there was sufficient evidence before the trial court for it to determine that Ms. Parker had adequate resources to care for N.H. *in the future*. Whether the evidence was sufficient in this case is a close question. But based on our binding jurisprudence on the issue, we must conclude that the evidence presented at the hearing was sufficient.

I believe that this case is more similar to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) (holding that the trial court's consideration of a home study was "adequate compliance" with the relevant statutes), than the three cases relied on in the dissenting opinion – *In re P.A.*, 241 N.C. App. 53, 772 S.E.2d 240 (2015), *In re J.H.*, ___ N.C. App. ___, 780 S.E.2d ___ (2015), and *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) – in which we held the evidence to be insufficient to justify the trial court's course of action. Specifically, like in *In re J.E.*, and unlike the three cases relied on in the dissent, there was evidence at the hearing in this matter that the current income of the prospective guardian, Ms. Parker, was adequate to care for the juvenile going forward. Specifically, Ms. Parker testified that she was employed as a bus driver and that her income was sufficient to cover her expenses in caring for N.H. with some left over for savings.[1] Accordingly, I concur with the majority. I write separately to highlight the distinction between *In re J.E.* and the three cases relied upon in the dissent.

The key distinction between *In re J.E.* and the three cases relied upon in the dissenting opinion is that in *In re J.E.* there was at least *some* evidence regarding the prospective guardian's resources to care for the minor *in the future*. In the three cases relied upon in the dissent, the evidence we found insufficient consisted of nothing more than

1. Ms. Parker essentially testified that she worked as a school bus driver, that she had cared for N.H. during the prior school year and was able to save money during the year, that she was out of work during the summer where she spent her savings and ran out of money, but that at the time of the hearing she was again employed as a bus driver and the income was sufficient to cover her needs and the needs of N.H.

evidence that (1) the prospective guardian *had* adequately cared for the juvenile in the recent *past*, and (2) a conclusory statement that the prospective guardian would be able to care for the juvenile in the future, without any reference to the evidence forming the basis of the opinion.[2]

In *In re J.E.* our Court held that evidence which consisted of a conclusion by DSS[3] that the prospective guardians "*have adequate income* and are financially capable of providing for the needs of [the juvenile]" was sufficient. *In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73 (emphasis added). In other words, the distinguishing factor was that the trial court had some evidence regarding the current income of the prospective guardians, which our Court held was sufficient even though there was nothing in our opinion to suggest that the trial court itself delved into the math in its investigation of the guardians' resources. Our Court in *In re P.A.* (one of the three opinions relied upon in the dissent) held that the conclusion by DSS in *In re J.E.* distinguished *In re J.E.* from *In re P.A.*, where there was no evidence regarding the prospective guardian's current resources to care for the juvenile going forward:

> *In re J.E.* is easily distinguishable from this case based upon the extensive evidence regarding the guardians presented in that case, which included the two home study reports.
>
> It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, *nor does the law require any specific form of investigation [by the trial court] of the potential guardian*. But the statute does require the trial court to make a determination that the guardian has "adequate resources" and *some evidence* of the guardian's "resources" is necessary as a practical matter[.]

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2. *In re P.A.*, 241 N.C. App. at 58, 772 S.E.2d at 245 (prospective guardian's opinion that she could and would care for the juvenile was insufficient to allow the trial court to make an independent determination regarding the guardian's resources going forward); *In re J.H.*, ___ N.C. App. at ___, 780 S.E.2d at 240 (trial court failed to consider any evidence regarding the potential guardians' *current* resources when it considered that the guardians had a history of caring for the juvenile in the past); *In re T.W.*, ___ N.C. App. at ___, 796 S.E.2d at 797 (evidence that the home of the potential guardian was suitable in size and condition to care for the juvenile and a vague assurance that the guardian was looking for work to provide for the juvenile in the future was insufficient).

3. "DSS" refers to the two departments of social services which had been involved in the matter.

In re P.A., 241 N.C. App. at 61-62, 772 S.E.2d at 246 (citations omitted) (emphasis added).

Like in *In re J.E.* the evidence in the present case consisted of more than just a conclusory opinion by Ms. Parker that she could care for N.H. The evidence also consisted of her testimony about her job and the income from her job. This testimony appears almost identical to the conclusion by DSS in *In re J.E.* It may be argued that such testimony from the guardian herself is not as credible as similar testimony from DSS, but this issue goes to the *weight* of the evidence, not its *sufficiency*. Accordingly, based on our holding in *In re J.E.*, I fully concur in the majority opinion holding that the trial court had sufficient evidence to make a determination regarding the adequacy of Ms. Parker's resources to care for N.H.

NORTH CAROLINA STATE BOARD OF EDUCATION, PLAINTIFF
v.
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION, DEFENDANTS

No. COA15-1229

Filed 19 September 2017

Constitutional Law—North Carolina—Rules Commission—authority to review rules of Board of Education

Separation of powers was not violated where the review and approval of rules made by the State Board of Education was appropriately delegated by the General Assembly to the North Carolina Rules Commission. The General Assembly adequately directed and limited the Commission's review of the Board's proposed rules.

Judge TYSON dissenting.

Appeal by Defendants from order entered 2 July 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 9 August 2016.

Campbell Shatley, PLLC, by Robert F. Orr, and Poyner Spruill LLP, by Andrew H. Erteschik, for Plaintiff-Appellee.

Troutman Sanders LLP, by Christopher G. Browning, Jr., for Defendant-Appellant North Carolina Rules Review Commission.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar Majmundar, and Special Deputy Attorney General Olga Vysotskaya de Brito, for Defendant-Appellant The State of North Carolina.

INMAN, Judge.

This appeal presents a question of first impression: Does the North Carolina Rules Review Commission, an agency created by the General Assembly, have the authority to review and approve rules made by the North Carolina State Board of Education, whose authority is derived from the North Carolina Constitution? For the reasons explained in this opinion, we conclude the answer is yes.

The North Carolina Rules Review Commission (the "Commission") and the State of North Carolina (collectively, "Defendants") appeal from a trial court's order granting summary judgment in favor of the North Carolina State Board of Education (the "Board") and denying Defendants' motion to dismiss. Defendants argue the trial court erred because the state constitution provides that the Board's power is "subject to laws enacted by the General Assembly," and the General Assembly created the Commission and delegated its review power to the Commission by enacting laws. The Board, however, contends that review by the Commission encroaches on its constitutional authority and that the General Assembly's delegation to the Commission of authority to review and "veto" Board rules violates the separation of powers provision in the North Carolina Constitution.

We hold that rules made by the Board are subject to statutes enacted by the General Assembly requiring review and approval by the Commission. We also hold that the General Assembly has not violated the separation of powers requirement by enacting an administrative procedure for state agencies and delegating to the Commission the power to review and approve—or disapprove—rules made by the Board. Accordingly, we reverse the trial court's order and remand to the trial court for entry of judgment in favor of Defendants.

Procedural and Appellate History

On 7 November 2014, the Board commenced this action against Defendants based upon the North Carolina Constitution. The Board's

complaint sought a declaratory judgment preventing the Commission from exercising any authority over the Board and, specifically, controlling the Board's enactment of rules. The complaint alleged two as-applied challenges to the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a), the Administrative Procedure Act ("the APA"), one joint as-applied and facial challenge,[1] and four facial challenges to the Commission's enabling legislation.[2]

The complaint did not identify any specific Board rule that had been thwarted by the Commission. The complaint alleged, however, the following:

> Since its inception in 1986, the [Commission] or its staff has objected to or modified every rule adopted by the Board and submitted to the [Commission] for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the [Commission] would have objected to these rules or struck them down.
>
> In addition, the [Commission] review process typically takes a minimum of six months and often longer. Thus, when the Board adopts rules, they do not have the force and effect of law until at least six months later. In the intervening months or, in some cases, years, statewide education policy is effectively enjoined by the [Commission] review process. In this regard, the [Commission's] exercise of authority over the Board's rulemaking erodes the Board's ability to timely address critical issues facing our State in the area of education.

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1. The joint as-applied and facial constitutional challenge, which is not at issue on appeal, alleged that the Commission's determination of whether a rule is within a rulemaking entity's authority is both facially unconstitutional and unconstitutional as applied to the Board because it violates Article I, Section 6 and Article IV, Section 1 of the state constitution.

2. The facial challenges, which are not at issue on appeal, alleged: (1) the Commission improperly exercises legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article I, Section 6 of the state constitution; (2) the General Assembly has not provided the Commission with adequate guiding standards in violation of Article I, Section 6 and Article II, Section I of the state constitution; (3) the Commission encroaches on the executive function of rulemaking in violation of Article I, Section 6 and Article III, Section 1 of the state constitution; and (4) the Board is a coequal of the executive and legislative branches of government and not an agency subject to the APA.

The complaint asserted that the Board would no longer voluntarily submit its rules to the Commission for approval and would nevertheless deem its rules to have the immediate full force and effect of law. The complaint acknowledged that the Board's position is in direct conflict with the Commission's interpretation and application of the APA and the Commission's enabling legislation.

On 12 January 2015, Defendants moved to dismiss the Board's complaint. The Board voluntarily dismissed without prejudice five of its seven claims, leaving only two as-applied challenges. The Board moved for affirmative summary judgment and the case was assigned to a single superior court judge. In a brief supporting their motion to dismiss and opposing the Board's motion for summary judgment, Defendants also argued that they were entitled to summary judgment in their favor.

On 29 June 2015, the trial court heard Defendants' motion to dismiss the Board's remaining two claims and the Board's motion for summary judgment on those claims. The first of these claims specifically asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article IX, Section 5 of the North Carolina Constitution, the constitutional provision that grants the Board rulemaking authority. The second claim asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board also violates Article I, Section 6, which requires the separation of powers, and Article II, Section 1, under which the General Assembly "may delegate a limited portion of its legislative power . . . ." *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

On 2 July 2015, the trial court entered an order allowing the Board's motion for summary judgment,[3] concluding:

> Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled

3. Although the State references the motion to dismiss in a heading of its brief and cites the appropriate standard of review, the State fails to offer any substantive analysis in support of its argument that the trial court erred in denying Defendants' motion to dismiss. We therefore deem that issue abandoned. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *N.C. Farm Bureau Mut. Ins. Co. v. Smith*, 227 N.C. App. 288, 292, 743 S.E.2d 647, 649 (2013) ("[Appellant] fail[s] to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned.").

> to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Defendants timely appealed to this Court.

The Board moved to dismiss Defendants' appeal pursuant to N.C. Gen. Stat. § 7A-27(a1), which provides that "[a]ppeal lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law." N.C. Gen. Stat. § 7A-27(a1) (2015). On 2 March 2016, this Court granted the Board's motion.

On 13 July 2016, the North Carolina Supreme Court entered a special order holding that the trial court's order did not facially invalidate an act of the General Assembly and remanded the appeal to this Court "for consideration of [D]efendants' challenges to the validity of the trial court's order on the merits."

We therefore address the trial court's ruling and the parties' arguments on the Board's two remaining claims.

Analysis

To better guide our determination of the issues raised on appeal, we consider the historical background surrounding the Board, its creation and evolution, the General Assembly's adoption of the APA and creation of the Commission, and the relation of the Board to the Commission.

I. Historical Context

A. Creation and Evolution of the Board

Public education in North Carolina predates the Board. Our state's first constitution (the "1776 Constitution") provided that "a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public . . . ." N.C. Const. of 1776, art. XLI.

In 1825, the General Assembly enacted a statute to "create a fund for the establishment of Common Schools." Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute established "a body corporate and politic, under the name of the President and Directors of the Literary Fund[,]" to administer and invest money controlled by the Fund. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute named the Governor as President of the Literary Fund's board—the first governing body for public education in North Carolina. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4.

The General Assembly allocated to the Literary Fund money from various revenue sources as well as all unoccupied swamp land in North Carolina, and vested the Literary Fund's board with the power to sell, invest, and otherwise exploit assets in the fund to generate revenue for public education and to build schools across the state. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4; Act of Feb. 10, 1855, ch. 27, 1854-55 N.C. Sess. Laws 50-62; *see also Bd. of Educ. Of Duplin Cnty. v. State Bd. of Educ.*, 114 N.C. 313, 317-19, 19 S.E. 277, 277-78 (1894).[4] The Literary Fund was all but depleted as a result of the Civil War. *See* Jonathan Worth, *Report of the President & Directors of the Literary Fund of North Carolina*, Exec. Doc. 18, General Assembly Session 1866-67 (1867).[5]

Following the Civil War, North Carolina adopted a new state constitution (the "1868 Constitution") which for the first time provided in its Declaration of Rights "a right to the privilege of education." N.C. Const. of 1868, art. I, § 27.[6] Unlike other declarations of rights, this provision did not restrict state government, but rather committed it to an affirmative duty. Orth, *supra*, at 52.

The 1868 Constitution also devoted a separate Article to education, beginning with the premise that "[r]eligion, morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged[,]" and providing for tuition "free of charge to all children of the State between the ages of six and twenty-one years." N.C. Const. of 1868, art. IX, §§ 1-2. It also established the State Board of Education as follows:

> The Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly,

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4. This decision was reprinted in 1921 as 114 N.C. 202.

5. The Report was submitted to the General Assembly on 10 December 1866 and printed with other executive and legislative documents maintained during the 1866-67 legislative session.

6. The 1868 Constitution, unlike the state's 1776 Constitution, was ratified by voters and incorporated individual rights which previously had been provided as constitutional amendments. *See* John V. Orth, *The North Carolina State Constitution*, 13 (1st ed. 1993).

> and when so altered, amended or repealed they shall not be re-enacted by the Board.

N.C. Const. of 1868, art. IX, § 9. The Board was composed entirely of *ex-officio* members, specifically the Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and the Attorney General. N.C. Const. of 1868, art. IX, § 7.

In 1931, the General Assembly established the North Carolina Constitutional Commission, which recommended a constitutional amendment empowering the Board to "supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto[,]" eliminating the word "legislate" from the Board's powers, and providing that "[a]ll the powers enumerated in this Section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly." *The Report of the North Carolina Constitutional Commission*, 33 (1932) (hereinafter the "*1932 Report*"). The Constitutional Commission proposed this amendment as part of an entirely rewritten state constitution. *Id.* at 5. A preamble to the proposed constitution noted that "the chief need is to relax many of the existing restrictions on the powers of the General Assembly, so as to allow more elasticity in shaping government policies, not only in respect to present conditions, but also in regard to future needed adjustments . . . ." *Id.* at 5. The General Assembly proposed the new constitution in 1933, but because of a technicality, the issue did not come before the voters.[7] John L. Sanders, *Our Constitutions: A Historical Perspective*, *in* North Carolina Manual 73, 77 (Liz Proctor ed., 2011).

In 1938, the Governor's Commission on Education issued a 63-page report recommending that the General Assembly propose to voters the

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7. The enabling statute provided that the new state constitution could be ratified by voters in the "next general election." Act of May 8, 1933, ch. 383, sec. 2, 1933 N.C. Pub. Laws, 573. An election was held in November 1933 for voters to consider the proposed 21st amendment to the United States Constitution, which would repeal Prohibition as established by the 18th Amendment. Act of May 9, 1933, ch. 403, sec. 1, 1933 N.C. Pub. Laws, 600. The revised state constitution was not on this ballot. *Opinions of the Justices in the Matter of Whether the Election Held on Tuesday After the First Monday in November, 1933, Was the Next General Election Following the Adjournment of the 1933 Session of the General Assembly*, 207 N.C. 879, 181 S.E. 557 (1934). After that election and prior to the next general election in November 1934, the North Carolina Supreme Court held in an advisory opinion that the proposed new state constitution could not be considered by voters because the enabling statute provided for an election date that had already passed. *Id.* at 880, 181 S.E. at 557-58; Sanders, *supra*, at 77; Orth, *supra*, at 20.

1932 draft amendment regarding the powers of the Board, and urging that if the amendment was submitted to voters in an election "not entangled with other amendments which might be less worthy, the people of the state will adopt the amendment." *Report and Recommendations of the Governor's Commission on Education*, 31 (Dec. 1, 1938) (hereinafter the "*1938 Report*").[8]

The Commission on Education reviewed the administrative challenge of a system governed by not only the Board but also by four other boards and commissions, and noted that "[t]here seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators." *1938 Report* at 30. The Commission recommended that "all these boards should be consolidated under [the Board] and that the direction of all activities of the teaching profession should come from this central board." *Id.* at 30. To provide the public school system "immediate relief from scattered administration rather than wait for the long time goal of the proposed constitutional amendment," the Commission also proposed that the General Assembly enact legislation to consolidate the work of the various boards and commissions and transfer their duties to the Board. *Id.* at 31.[9]

In 1942, voters adopted a constitutional amendment proposed by the General Assembly making several changes to the governance and power of the Board. Thad Eure, North Carolina Manual, 239-43 (1943). One section of the amendment reduced the number of *ex-officio* members and provided for a majority of the Board to be appointed by the Governor. N.C. Const. of 1868 (amended 1942) art. IX, § 8; Act of March

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8. The General Assembly in 1937 directed the governor to appoint a commission to examine North Carolina's public education system and to recommend reforms to lawmakers. Act of March 22, 1937, ch. 379, 1937 N.C. Pub. Laws, 709.

9. Despite a provision in the 1868 Constitution for the state to be responsible for providing free public education, efforts by the General Assembly before 1942 to shift primary administrative and funding responsibilities from counties to the state were unsuccessful. *See 1938 Report* at 34. For example, the School Machinery Act implemented a new statewide sales tax to support public schools with money for textbooks, supplies, and teacher salaries. Act of April 3, 1939, ch. 358, 1939 N.C. Pub. Laws, 771-91. Still, counties remained responsible for building schools. *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 4, 9 S.E.2d 606, 608 (1940). "To call the resulting condition one of uniformity is to tax optimism. There are one hundred counties in the State, each with its own difficulties and problems, some of which seem to be almost unsolvable. There are one hundred governing boards, composed of men who have widely different ideas upon this subject and with a discretion which may be exercised and reflected in widely divergent standards throughout the State." *Id.* at 7, 9 S.E.2d at 610.

13, 1941, ch. 151, sec. 1-3, 1941 N.C. Pub. Laws, 240-41. Another section of the amendment, central to the matter at hand, revised the Board's authority as follows:

> The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text-books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and *make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.*

N.C. Const. of 1868 (amended 1942), art. IX, § 9 (emphasis added).

The 1942 amendment eliminated the provision for the Board to have the "full power to legislate." *Id.* It also eliminated the provision that the Board's rules could be "altered, amended or repealed" by the General Assembly and instead provided that "[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly." *Id.*

In an article advocating that voters adopt the 1942 amendment, one educator explained that because most of the Board's members were elected to fill other offices unrelated to education, the Board "could not possibly do the job of administering a growing public school system." Ralph W. McDonald, Guy B. Phillips, Roy W. Morrison & Edgar W. Knight, *The Constitutional Amendment for a State Board of Education in North Carolina*, 25 The High Sch. J., no. 6, 265, 266 (Oct. 1942). "From time to time, therefore, the Legislature has been forced to set up boards and commissions to carry out duties and responsibilities which, under the Constitution, the State Board of Education was supposed to exercise." *Id.* at 266-67. The other boards and commissions included the State School Commission, the Board of Vocational Education, the Board of Commercial Education, and the State Textbook Commission. *Id.* Even the Literary Fund, which the Board was created to replace after the

Civil War, remained vested with education funds and provided loans for school construction and improvements. N.C. Code 1935 (Michie), § 5683.

In 1955, the General Assembly reorganized public education laws and established a statewide uniform system of public schools in a chapter of the General Statutes. Act of May 26, 1955, ch. 1372, sec. 1, 1955 N.C. Sess. Laws 1527. These statutes have been amended over time and are now codified in Chapter 115C of the General Statutes, titled "Elementary and Secondary Education." N.C. Gen. Stat. § 115C-1 (2015).

Our state constitutional provisions for public education have not materially changed since 1942. Following the General Assembly's proposal in 1969 for a complete revision of the 1868 Constitution, Act of July 2, 1969, ch.1258, sec. 1, 1969 N.C. Sess. Laws 1461, and the voters' adoption of the revision in the general election of 1970, the Constitution was amended to its current form. N.C. Const. of 1970;[10] *see also* Sanders, *supra*, at 80-87. The section delineating the Board's powers was renumbered and revised to provide:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. of 1970, art. IX, § 5. A report by the North Carolina State Constitution Study Commission stated that Article IX, Section 5 "restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced." *Report of the State Constitutional Study Commission*, 87 (1968) (hereinafter the "*1968 Report*").

B. Enactment of the APA and Creation of the Commission

In 1973, the General Assembly enacted the APA, initially adopted as Chapter 150A of the General Statutes. The original APA declared that its purpose "shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies." N.C. Gen. Stat.

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10. The latest version of the North Carolina Constitution is referred to by different authorities as "the 1970 Constitution" or "the 1971 Constitution." *Compare N.C. State Bar v. DuMont*, 304 N.C. 627, 633, 286 S.E.2d 89, 93 (1982), *with* Orth, *supra*, at 20. This opinion will refer to the document as the 1970 Constitution.

§ 150A-1(b) (Cum. Supp. 1977). The APA provides a comprehensive statutory scheme for procedures to allow and require, *inter alia*, notice to the public of proposed rules, public input regarding proposed rules, and due process for individuals affected by administrative rules and decisions.

The APA was rewritten and recodified as Chapter 150B effective 1 January 1986, and its purpose restated to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies" and to ensure that rulemaking, advocacy, and adjudication "are not all performed by the same person in the administrative process." N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985).

The APA does not explicitly list the Board as a state agency, but it defines "agency" as meaning "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch." N.C. Gen. Stat. 150B-2(1a) (2015). The APA expressly and fully exempts from its application several state agencies listed in N.C. Gen. Stat. § 150B-1(c), exempts from its rulemaking provisions several other state agencies listed in N.C. Gen. Stat. § 150B-1(d), and exempts from its contested case provisions several other agencies or agency functions. The Board is not listed in any of the exemptions.

At the same time it recodified the APA, the General Assembly added a statute establishing the Rules Review Commission to review all rules promulgated by any state agency subject to the APA. Act of July 16, 1986, ch. 1028, sec. 32, 1985 N.C. Sess. Laws 1028 (originally codified at N.C. Gen. Stat. § 143B-30.1 (Interim Supp. 1986)). The statute as currently codified requires that temporary and permanent rules proposed by an agency be submitted and approved by the Commission before becoming effective. N.C. Gen. Stat. §§ 150B-21.8(b) and 150B-21.9 (2015).

C. Intersection of the Board's and the Commission's Authority

In 1981, following the General Assembly's enactment of the APA, the General Assembly added to Article 1 of Chapter 115C, governing the public education system, a statute making all action by all agencies governed by the Chapter subject to all provisions of the APA. Act of May 20, 1981, ch. 423, sec. 1, 1981 N.C. Sess. Laws 510; N.C. Gen. Stat. § 115C-2 (Cum. Supp. 1981); *see* N.C. Gen. Stat. § 115C-2 (2015).

For more than a quarter century, the Board proposed rules to the Commission for review and otherwise participated in the rules

review process. However, as evidenced by this dispute, the Board now challenges the Commission's authority to limit the Board's rule-making authority derived from the North Carolina Constitution. With this historical context in mind, we turn to the trial court's order and Defendants' appeal.

II. Standard of Review

We review a trial court's order denying or granting a motion for summary judgment *de novo*. *Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 390, 612 S.E.2d 390, 392 (2005). A trial court's interpretation of the state constitution or a statute is also subject to *de novo* review. *See Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015); *see also Ennis v. Henderson*, 176 N.C. App. 762, 764, 627 S.E.2d 324, 325 (2006). *De novo* review allows this Court to substitute its judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

Even when applying *de novo* review, however, we must abide by the long established presumption that statutes—including all statutes implicated by the Board's challenge to the Commission's authority—are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." (internal citations and quotation marks omitted)). "[T]he constitutional violation must be plain and clear." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

Neither the trial court nor this Court possesses the authority to decide whether governmental action required or allowed by a statute fosters good or bad policy. "If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." *Hart*, 368 N.C. at 126, 774 S.E.2d at 284 (citation omitted).

III. Discussion

A. The Closest, But Not Controlling, Precedent

No North Carolina appellate court has previously decided the issue presented in this appeal. The North Carolina Supreme Court came the closest in *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991), when it invalidated the Board's temporary rule prohibiting local school boards from contracting with a television content provider for short news segments that included commercial advertising. The

Supreme Court held that because the General Assembly had enacted a statute delegating to local school boards the selection of supplemental educational materials, the Board had no authority to enact a rule on the subject. *Id.* at 466, 402 S.E.2d at 562.

The dispute in *Whittle* was prompted when the Commission disapproved of the rule on the ground that it exceeded the Board's statutory authority. *Id.* at 460, 402 S.E.2d at 558. A superior court judge reviewed the matter and held that the Board's rule was invalidly adopted in violation of the APA. The Board appealed, arguing, *inter alia*, that the APA rulemaking requirements did not apply to rules implementing the state constitution's grant of authority to the Board. *Id.* at 463-64, 402 S.E.2d at 560. The Supreme Court rejected the Board's argument on a narrower ground. *Id.* at 466-67, 402 S.E.2d at 562. It interpreted the statute authorizing local boards to select supplemental materials as leaving such selection "entirely to the discretion of local school boards[,]" and held that the Board's rule necessarily conflicted with the existing statute. *Id.* at 465, 402 S.E.2d at 561. In light of the existing statute, the Supreme Court reasoned, "deciding whether the State Board had the authority, absent legislative action, to enact this rule through direct constitutional authority and deciding whether the APA provisions concerning the adoption of temporary rules apply are not necessary to a resolution of this issue." *Id.* at 466-67, 402 S.E.2d at 562.

Two dissenting justices, both prominent state constitutional scholars, offered no constitutional analysis to protect the Board's rulemaking authority. *Id.* at 471-77, 402 S.E.2d at 565-68 (Martin., J., joined by Exum, C.J., dissenting). The dissenting opinion noted that the statute cited by the majority did not grant the local boards *exclusive* authority to select and procure supplemental materials. Id. at 472, 402 S.E.2d at 565. The dissent also interpreted the Board's rule to constrain only the purchase of materials in a format limiting or impairing the authority of local boards and administrators to determine the content and timing of materials presented to students. *Id.* at 473-74, 402 S.E.2d at 566.

Because this appeal concerns the Commission's authority to review and approve all Board rules, the issue before us exceeds the parameters of *Whittle*.

B. Constitutional Powers and Limits of the Board

The Commission argues that the trial court erred in entering summary judgment rendering all rules promulgated by the Board exempt from the Commission's rules review and approval process. The Board argues, as it did successfully before the trial court, that Article IX, Section

5 of the North Carolina Constitution endows it with broad rulemaking authority subject only to specific enactments of the General Assembly, and that review by the Commission is not a specific enactment of the General Assembly.

In reviewing this issue, we must consider the relationship between the Board's authority derived from the North Carolina Constitution, the General Assembly's authority to restrict the Board's authority, and the General Assembly's authority to delegate to the Commission the power to review, approve, and disapprove rules proposed by the Board.

Our analysis is guided by "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Berger*, 368 N.C. at 639, 781 S.E.2d at 252 (citation omitted); *see also Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) ("In interpreting our Constitution, we are bound to 'give effect to the intent of the framers of the organic law and of the people adopting it.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))); *DuMont* 304 N.C. at 634, 286 S.E.2d at 93-94 ("Reference may be had to unofficial contemporaneous discussions and expositions in arriving at a correct interpretation of the fundamental law.").

The 1868 Constitution vested in the Board the "full power to legislate and make all needful rules and regulations" for public schools, and provided that "all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly . . . ." N.C. Const. of 1868, art. IX, §9. This language appears to limit the General Assembly to acting only once the Board has enacted some rule or regulation. Therefore, under the 1868 Constitution, the General Assembly would not, for example, be able to require the Board to gain legislators' approval of proposed rules before their enactment, because such action does not fall within the language of "alter," "amend," or "repeal." However, this aspect of the 1868 Constitution has not previously been examined by our appellate courts.

The only reported legal dispute about the 1868 constitutional provisions for education concerned how to pay for public schools. The North Carolina Supreme Court held in *Lane v. Stanly*, 65 N.C. 153, 157 (1871),[11] that "the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and

11. This decision was reprinted in 1964 as 65 N.C. 117.

by the taxing power of the counties, and the State board of education, by the aid of School committees, manage[s] it." *Lane* held that county commissioners, but not town boards, could tax citizens for public schools concurrent with the General Assembly's authority to impose taxes for public education. *Id.* at 156-58. It did not address the parameters of the Board's authority to manage the public school system or the parameters of the General Assembly's authority to enact public education rules.

The 1942 amendment to Article IX, Section 9 divested the Board of legislative authority and made the Board's rulemaking authority subject to the General Assembly's legislative authority. The amendment, as discussed *supra*, eliminated language vesting in the Board the "full power to legislate," replacing it with enumerated specific duties and the authority "generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The 1942 amendment also eliminated the language restricting the General Assembly's authority over the Board to alter, amend, or repeal the Board's rules and instead provided, more broadly, that the Board's authority was "subject to such laws as may be enacted from time to time by the General Assembly." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The question before us is whether this change in language, ratified by voters in 1942 and substantially retained in the 1970 Constitution, permits the General Assembly to limit the Board's rulemaking authority by requiring prior approval of the Board's proposed rules by the General Assembly or an executive branch agency other than the Board.

The Board argues that the first sentence of the 1942 amendment to Article IX, Section 9, which defined the governance of the Board, "clarified that the Board retained all the powers it held under the 1868 Constitution"—including the power to legislate all matters related to public education—subject only to being altered, amended, or repealed by the General Assembly. The first sentence of Section 9 provided that "[t]he State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted." N.C. Const. of 1868 (amended 1942), art. IX, § 9. The Board's interpretation conflicts with the amendment's deletion of the Board's power to legislate and its added grant to the General Assembly of broader oversight of the Board.

"[I]n case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part and the construction is to be such as to give effect to the entire instrument and not to raise any

conflict between its parts which can be avoided." *State v. Baskerville*, 141 N.C. 811, 818, 53 S.E. 742, 744 (1906).[12]

Construing the first sentence of the 1942 amendment to revive and preserve the full scope of authority provided to the Board in the 1868 Constitution, as the Board argues, directly conflicts with the 1942 amendment's limitation on that authority by deleting the provision for "full power to legislate." The Board's argument also conflicts with the amendment's final full sentence providing that the Board's authority is wholly subject to laws enacted by the General Assembly. To interpret an amendment that reallocates powers between the Board and the General Assembly as preserving the Board's previous powers fails the test of common sense.

These competing provisions in the 1942 amendment can be harmonized by interpreting the first sentence to establish that the Board, and none of the other then-existing education boards and commissions created by the General Assembly since 1868, was authorized to regulate public schools. Reciting that the Board succeeded to all the powers of the Literary Fund's board nullified the authority of other boards and commissions to perform duties initially assigned to the Board. This interpretation is also consistent with the amendment's additional provisions listing specific powers vested in the Board which previously had been exercised by the other, "scattered" administrative agencies.

In addition to the basic canon of constitutional construction to interpret separate provisions in harmony, history also favors our interpretation of the 1942 amendment. "A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided." *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. As discussed *supra*, at the time the 1942 amendment was ratified, there had been a decade-long push, evidenced by the 1931 Constitutional Commission's preamble to its proposed constitutional rewrite, to "relax many of the existing restrictions on the powers of the General Assembly," as a way "to allow more elasticity in shaping governmental policies . . . in regard to future needed adjustments . . . ." *1932 Report* at 5. The intent of the General Assembly in proposing the 1932 Constitution can be extended to the 1942 amendment because the underlying reasoning for the amendment, as discussed in intervening years, had not changed.

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12. This decision was reprinted in 1921 as 141 N.C. 617.

The General Assembly's declared purpose of the APA upon its recodification was to "establish[] a uniform system of administrative rulemaking and adjudicatory procedures for agencies" and to ensure that rulemaking, advocacy, and adjudication "are not all performed by the same person in the administrative process." N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985). The need for uniformity in agency rulemaking procedures is simply one such "future needed adjustment" fostered by the 1942 amendment.

Based on the plain language of the constitutional text, further bolstered by supplemental authorities, we hold that by the 1942 amendment to the North Carolina Constitution, the framers and voters consolidated in the Board all administrative authority governing a statewide public school system, limited the Board's authority to making rules and regulations subject to laws enacted by the General Assembly, eliminated the Board's authority to legislate, and thereby restored to the General Assembly all legislative authority regarding public education.

We are not persuaded by the Board's argument that the 1942 amendment could not divest the Board of authority derived from the 1868 Constitution. The Board has cited no judicial decision, no statute, and no other authority supporting its contention that the framers of the 1868 Constitution intended to preclude a later constitutional amendment modifying the Board's authority and the manner in which the General Assembly ultimately governs the Board. We are aware of no authority that prohibits a state constitution from diminishing the constitutionally derived authority of any agency by constitutional amendment so long as the amendment does not violate the United States Constitution.

" '[U]nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.' " *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (alteration in original) (quoting *Thomas v. Sanderlin*, 173 N.C. 329, 332, 91 S.E. 1028, 1029 (1917)). Although the General Assembly was restrained by the 1868 Constitution from making public education laws except by altering, amending, or repealing legislation by the Board, the 1942 amendment expanded the General Assembly's legislative authority, and the prior restrictions no longer apply.

The 1970 Constitution did not in any meaningful way amend the Board's authority to make rules and regulations, as it still provides that the Board "shall make all needed rules and regulations . . . subject to laws enacted by the General Assembly." N.C. Const. of 1970, art. IX, § 5.

The North Carolina Supreme Court declared that the intent of the 1970 Constitution was merely to "update, modernize and revise editorially the 1868 Constitution." *DuMont*, 304 N.C. at 636, 286 S.E.2d at 95 (citing the *1968 Report*).[13] Among the extraneous and obsolete provisions deleted in the 1970 Constitution was the first sentence in the 1942 amended section describing the powers and duties of the Board, which provided that the Board "shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted." N.C. Const. of 1970, art. IX, § 5. That the deletion of this section in 1970 was viewed as merely editorial confirms our interpretation of the sentence as clarifying that the Board, and not any other administrative agency existing in 1942, would establish rules and regulations for the public schools.

The Board relies on *DuMont*'s holding that "the 1970 framers intended to preserve intact all rights under the 1868 Constitution" for the assertion that the Board maintains its powers under the 1868 Constitution. 304 N.C. at 636, 286 S.E.2d at 95. This argument is misplaced. Unlike the provision for the right to a jury trial, which was unchanged between 1868 and 1970 and was at issue in *DuMont*, our state constitution's provision for the power and duties of the Board was substantively amended in 1942. *DuMont* did not address that pivotal amendment or the 1942 framers' intent. And unlike *DuMont*, this case does not concern the scope of an individual right rooted in the state constitution. The North Carolina Constitution vests individual citizens with the right to free public education. N.C. Const. of 1970, art. I, § 15; *see also Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 616-17, 599 S.E.2d 365, 377-78 (2004) ("*Leandro II*") (holding that the constitutional right to public education is vested in children and not in state entities); *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) ("*Leandro I*"). It does not vest the Board with any rights, but rather with power and responsibilities.

Our interpretation of the 1942 amendment requires that we reject the Board's argument that it is vested with broad authority that cannot be limited except as through alteration, amendment, and repeal by the General Assembly.

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13. Constitutional scholars share the view that the 1970 Constitution primarily addressed editorial, and not substantive, concerns. Orth, *supra*, at 20-21 (describing the 1970 Constitution as "a good-government measure, long matured and carefully crafted by the state's lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it."); Sanders, *supra*, at 81-82 (referring to the amendments as "extensive editorial changes" and "substantive changes that the commission judged would not be controversial or fundamental in nature[]").

The North Carolina Supreme Court considered the Board's rulemaking authority, as amended in 1942, in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971). In *Guthrie*, the plaintiff, a public school teacher, challenged a Board regulation requiring teachers to complete certain courses to qualify to renew their teaching certificates. *Id.* at 709, 185 S.E.2d at 198. The Supreme Court noted that the last sentence of Article IX, Section 9 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Id.* at 710, 185 S.E.2d at 198. But because the General Assembly had not limited the Board's rulemaking powers regarding teacher certification, the Board's regulation was valid. The Supreme Court explained:

> The Constitution, itself, . . . conferred upon the State Board of Education the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. Thus, *in the silence of the General Assembly*, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution, itself.

Id. at 710, 135 S.E.2d at 198-99 (emphasis added).

Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board's rulemaking powers. The General Assembly, by enacting laws adopting a uniform statutory scheme governing administrative procedure, including the establishment of the Commission to review administrative rules, has imposed the requirement that the Board's rules be reviewed and approved prior to becoming effective. Our holding that the Board's rulemaking authority is subject to statutes providing for review and approval is therefore consistent with the holding in *Guthrie* and falls within the 1942 amendment's delineation of the General Assembly's authority over the Board.

C. Delegated Powers of the Commission

As discussed *supra*, the General Assembly has delegated to the Commission the procedural process through which the Board's rules are reviewed and approved before becoming effective. The Board contends that statutes making its rules subject to the Commission's review and approval result in an unconstitutional delegation of authority by the General Assembly in violation of Article I, Section 6 (separation of

powers provision), Article II, Section 1 (vesting legislative power in the General Assembly), and Article IX, Section 5 (vesting rulemaking power in the Board). We disagree.

Article II, Section 1 of the North Carolina Constitution vests the General Assembly with the broad power to legislate. N.C. Const. of 1970, art. II, § 1. It also permits the General Assembly to delegate "a *limited* portion of its legislative powers," *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323 (emphasis in original), in contrast with its "supreme legislative power," *id.*, to certain agencies "so long as adequate guiding standards are provided." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978); *see also* N.C. Const. of 1970, art. II, § 1.

As explained by the North Carolina Supreme Court in *Adams*:

> [W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rulemaking powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

295 N.C. at 697, 249 S.E.2d at 410 (internal citations omitted).

The *Adams* Court explained why the General Assembly's delegation of authority is necessary: "A modern legislature must be able to delegate—in proper instances—'a limited portion of its legislative powers' to administrative bodies which are equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly.' " *Id.* at 697, 249 S.E.2d at 410 (quoting *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323).

The General Assembly's and the Board's authority specific to education are both derived from the same Article IX, Section 5 of the North Carolina Constitution. But unlike the Board, the General Assembly possesses power that exceeds the scope of Section 5. Article II, Section 1 of the North Carolina Constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." This plenary provision vests in the legislative branch the power to enact all laws not prohibited by the constitution, including the APA and the enabling statute for the Commission. The General Assembly has not delegated to the Commission the overarching authority to enact legislation limiting the Board's rulemaking. Rather, the General Assembly exercised its

authority by enacting statutes requiring the Board to obtain approval of proposed rules before they take effect. The General Assembly has merely delegated the implementation of its legislation to the Commission.

The Board argues, and our dissenting colleague agrees, that this Court should adopt the reasoning of the Supreme Court of Appeals of West Virginia, which held that any statutory provision interfering with the rulemaking authority of that state's board of education violated the separation of powers clause in that state's constitution. *West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 455-56, 376 S.E.2d 839, 843 (1988). The West Virginia court in *Hechler* invalidated a statutory amendment making rules promulgated by the board of education, which historically had been exempt from administrative review, subject to review and approval by a new legislative oversight commission on educational accountability. *Id.* at 455-56, 376 S.E.2d at 843. But West Virginia's constitutional provision for its board of education is not the same as ours, nor did it evolve in a manner similar to ours. Also, the Commission's structure differs materially from the review commission in West Virginia, which was composed solely of members of its legislature.[14] For these reasons, we decline to follow *Hechler*.

The dissent also emphasizes that the North Carolina Constitution expressly vests in the Board the power to make "needed rules and regulations" relating to public education and asserts that by subjecting the Board's rules to review and approval by the Commission, the General Assembly has impermissibly transferred to the Commission an express power conferred upon it by our state constitution. But the General Assembly has by statute ensured that the Commission is unable to create and impose rules, and has made clear that the Commission does not have the authority to review the substantive efficacy of rules proposed by the Board. N.C. Gen. Stat. § 150B-21.9 (2015). The Commission's authority to implement the review and approval process is subordinate to the General Assembly's authority to create the review and approval process. Therefore, we are unpersuaded that the Commission's power is in conflict with the Board's broad rulemaking authority.

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14. If the Commission here were solely composed of legislators, we would be presented with an entirely different issue concerning the separation of powers—namely, the legislature may not delegate powers to itself. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (holding that "the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality").

The "complex conditions" and "numerous details" considered by the Commission with respect to rules proposed by the Board, consistent with our Supreme Court's holding in *Adams*, include the more than 100 local school districts across the state, more than 500 statutes in Chapter 115C of the General Statutes,[15] and hundreds of administrative rules governing our public schools in Title 16 of the Administrative Code on topics ranging from teacher certification to curriculum to school buses. N.C. Admin. Code tit. 16, *et seq.* (April 2016).

The General Assembly is not always in session, and even when in session, legislators and their able staff have inadequate time and human resources to address the many specific needs and issues in the public school system by legislation. The General Assembly's interest in uniformity among administrative agencies is served by making one central agency responsible for reviewing the rulemaking by all of the others. For this reason, delegation of adjudicative authority to the Commission is necessary. "The goals and policies set forth by the legislature for the agency to apply in exercising its powers need be only as specific as the circumstances permit." *Matter of Broad and Gales Creek Cmty. Ass'n*, 300 N.C. 267, 273, 266 S.E.2d 645, 651 (1980) (internal citations omitted). "It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Adams*, 295 N.C. at 698, 249 S.E.2d at 411.

In assessing whether the guiding standards provided by the General Assembly are adequate, "it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards." *Id.* at 698, 249 S.E.2d at 411. "[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to insure that the decision-making by the agency is not arbitrary and unreasoned." *In re Declaratory Ruling by N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142 (1999) (internal quotation marks and citation omitted).

The General Assembly has provided the Commission with criteria for reviewing the permanent rules submitted to it by state agencies, including the Board. These criteria include, *inter alia*, specific provisions in hundreds of statutes and administrative code sections

15. The General Assembly also has provided by statute for the Board's authority by incorporating the provisions of the state constitution and adding dozens of specific powers and duties. N.C. Gen. Stat. § 115C-12 (Interim Supp. 2016).

previously enacted. The Commission's review is limited to determining whether a proposed rule: (1) is "within the authority delegated to the agency by the General Assembly[;]" (2) is clear and unambiguous; (3) is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency[;]" and (4) was adopted in accordance with the procedures prescribed by the APA for rulemaking. N.C. Gen. Stat. §§ 150B-21.9(a)(1)-(4).

The Board argues, and our dissenting colleague agrees, that the first of these criteria for review by the Commission, to determine whether a proposed rule is "within the authority delegated to the agency by the General Assembly," cannot apply to the Board because its authority is delegated not merely by the General Assembly, but by the North Carolina Constitution. This point, considered in isolation, is persuasive. But when the plain language of a statute appears to create a constitutional conflict, we must look to other statutes, to our state constitution, and to precedent for guidance. Considering the genesis and evolution of the Board, the APA, and the Commission, and the Supreme Court's reasoning in *Whittle*, which resolved a similar issue in favor of upholding the Commission's authority, we are not persuaded that the Board's authority to make rules in any subject area is beyond the reach of the APA.

The General Assembly has also expressly protected its legislative authority from encroachment by the Commission. N.C. Gen. Stat. § 150B-21.9 provides that "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection[,]" which restricts the Commission from providing substantive review of proposed rules.

Additionally, the General Assembly has provided adequate procedural safeguards by subjecting the Commission's decisions regarding whether the Board (or any agency) has properly followed the APA's procedures for promulgating rules to judicial review. *See* N.C. Gen. Stat. § 150B-21.8(d). Indeed, the Board has employed this procedural safeguard to obtain judicial review in the trial and appellate courts. *See Whittle*, 328 N.C. 456, 402 S.E.2d 556.

We hold that the review and approval authority delegated to the Commission is an appropriate delegable power and that the General Assembly has adequately directed the Commission's review of the Board's proposed rules and limited the role of the Commission to evaluating those proposed rules to ensure compliance with the APA.

By providing adequate guidelines for rules review, the General Assembly has ensured that the Commission's authority as it relates to the rules promulgated by the Board is not "arbitrary and unreasoned" and is sufficiently defined to maintain the separation of powers required by our state constitution. *In re Declaratory Ruling*, 134 N.C. App. at 33, 517 S.E.2d at 142. Accordingly, we reject the Board's challenge to the Commission's authority based on constitutional provisions for separations of power.

Conclusion

For the reasons we have explained, we hold that: (1) the 1942 amendment to Article IX of the North Carolina Constitution rebalanced the division of power between the Board and the General Assembly by limiting the Board's authority to be subject more broadly to enactments by the General Assembly; (2) the General Assembly, by enacting the APA and creating the Commission, acted within the scope of its constitutional authority to limit the Board's rulemaking authority by requiring approval of rules prior to enactment; (3) the General Assembly's delegation to the Commission of the authority to review and approve Board rules does not contravene the Board's general rulemaking authority; and (4) the General Assembly has delegated review and approval authority to the Commission without violating the separation of powers clause by providing adequate guidance and limiting the Commission's review and approval power.

Because the undisputed facts compel these conclusions, and because no other factual allegations can change the constitutional relationship of the Board, the General Assembly, and the Commission, the trial court erred in entering summary judgment in favor of the Board and in denying Defendants' motion for summary judgment. The trial court's order is reversed and this matter is remanded for entry of judgment in favor of Defendants.

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion. Defendant has failed to show error in the superior court's ruling that the General Assembly has not constitutionally delegated its authority over rules and regulations adopted by the North Carolina State Board of Education ("State Board") to the Rules Review Commission ("RRC") by enacting the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Gen. Stat. § 150B (2015).

I. Article IX, Section 5

The plain language of Article IX, Section 5 of the North Carolina Constitution states:

> The State Board of Education *shall supervise and administer* the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and *shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.*

N.C. Const. art. IX, § 5 (emphasis supplied).

Our Supreme Court has established the proper standard of review: "In interpreting our Constitution[,]. . . where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (citation omitted). Under the plain language of this article, only "laws enacted by the General Assembly" may take precedent over "needed rules and regulations" promulgated by the constitutionally established State Board. N.C. Const. art. IX, § 5.

The RRC is not the General Assembly. *See* N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."). Review by and decisions of the RRC are not "laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

The RRC was created by statute in 1986, long subsequent to the ratification of the current version of Article IX, § 5, and consists of ten non-elected members appointed by the General Assembly. N.C. Gen. Stat. § 143B-30.1(a) (2015); 1985 N.C. Sess. Law 1028. The RRC members purported to act on their own accord in delaying and striking down "needed rules and regulations" established under constitutionally mandated

policy of the State Board, without bicameral review and presentment of a bill.

The RRC's purpose is to "review[] administrative rules in accordance with Chapter 150B of the General Statutes." N.C. Gen. Stat. § 143B-30.2 (2015). The NCAPA defines "rule" as "*any agency regulation*, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." N.C. Gen. Stat. § 150B-2(8a) (2015) (emphasis supplied).

The majority's opinion accepts Defendants' usurpation of the plain language of Article IX and the framers' intent, and holds the various laws which establish the RRC and its review process are "laws enacted by the General Assembly," and that the policies and procedures of the State Board are "subject to" RRC review and authority. *See* N.C. Const. art. IX, § 5.

Under the plain language of Article IX, the People established the State Board and intended its educational policy and rulemaking authority to be limited only by "laws enacted by the General Assembly," which requires bicameral review and presentation of a bill. The People did not intend the constitutional rulemaking authority of the State Board to be "subject to" delays and veto by a commission of non-elected officials, who are statutorily tasked under the NCAPA to review proposed "agency rules." *See* N.C. Gen. Stat. § 143B-30.2; N.C. Gen. Stat. § 150B-2(8a). The General Assembly cannot either usurp nor delegate the specific constitutional authority vested in the State Board by the People.

II. *West Va. Bd. of Educ. v. Hechler*

This issue appears to be of first impression in our State. The sound analysis and holding of the Supreme Court of Appeals of West Virginia, which ruled upon this issue, is persuasive. *See West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). The Constitution of West Virginia provides: "The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." W. Va. Const. art. XII, § 2. The West Virginia legislature created a "legislative oversight commission on education accountability." *Hechler*, 180 W. Va. at 452, 376 S.E.2d at 840. As here, the Board of Education was purportedly required to submit its proposed rules to the oversight commission for review, and the commission would recommend that the legislature either promulgate the rule or the rule be withdrawn. *Id.* at 453, 376 S.E.2d at 840.

The West Virginia Supreme Court of Appeals held the state constitution granted the West Virginia Board of Education rulemaking powers, "and any statutory provision that interferes with such rule-making is unconstitutional," and the legislature's "attempt to undertake the Board's general supervisory powers" violates the separation of powers clause of the West Virginia Constitution. *Id.* at 455-56, 376 S.E.2d at 843.

In support of its holding, the court explained:

> Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens. . . . [T]he citizens of this state conferred general supervisory powers over education and one need not look further than art. XII, § 2 of the State *Constitution* to see that the "general supervision" of state schools is vested in the State Board of Education. *Unlike most other administrative agencies which are constituents of the executive branch, the Board enjoys a special standing because such a constitutional provision exists.*

Id. at 455, 376 S.E.2d at 842-43 (second emphasis supplied).

Our Constitution *specifically* gives the State Board the power to promulgate "needed rules and regulations" to set policy and to "*supervise and administer* the free public school system." *See* N.C. Const. art. IX, § 5 (emphasis supplied). The State Board is the only constitutionally created board, yet the RRC admitted during oral argument that it treats the Board and its proposed rules the same as any other "executive agency."

As explained in *Hechler*, the General Assembly's purported transfer of the State Board's constitutional authority to promulgate its own rules and regulations to an agency rule review entity denies the State Board an express power, which has been constitutionally conferred upon the State Board by the People.

Under the plain language of Article IX, the rulemaking authority of the State Board is "subject to limitation and revision by acts of the General Assembly." *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), *cert. denied*, 406 U.S. 920, 32 L. Ed. 2d 119 (1972). While the General Assembly may "limit and revise," the State Board's exercise of its primary authority under Article IX, *see id.*, the State Board's power to establish educational policy and to promulgate its own rules and regulations does not derive its authority from, nor depend upon the General

Assembly. By enacting the NCAPA, the General Assembly could not and did not transfer the State Board's constitutionally specified rulemaking power to an agency rule oversight commission under the NCAPA.

The legislative, executive, and judicial branches of government "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. In interpreting this clause, our courts have long recognized that "a modern legislature must be able to delegate – in proper instances – a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (citations and internal quotation marks omitted).

The rule in *Adams*, allowing the General Assembly to delegate a "limited portion of its legislative powers," does not apply here. "[S]uch powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law." Thomas M. Cooley, *Cooley's Constitutional Limitations* 215 (8th ed. 1927). The People of North Carolina granted and conveyed to the State Board powers, which are not intended to be, and cannot be, removed from the State Board and subordinated to or overruled by an executive agency review body. *Id.*

Furthermore, in reviewing an agency's rule, the RRC determines whether the rule meets the following NCAPA criteria:

> (1) It is within the authority *delegated to the agency by the General Assembly*.
>
> (2) It is clear and unambiguous.
>
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
>
> (4) It was adopted in accordance with Part 2 of this Article [which governs the rulemaking procedure].

N.C. Gen. Stat. § 150B-21.9(a) (2015) (emphasis supplied).

The authority of the State Board to promulgate its own rules and regulations to establish educational policy are constitutionally established and cannot be "delegated by the General Assembly." *See id.* Reviewing the plain language of the NCAPA, the RRC's mandate and standard for reviewing agency rules does not include rules that are promulgated *by a constitutionally created and empowered Board* expressly acting under their *constitutionally mandated authority*. The General Assembly's guiding standards to the RRC and definitions in the NCAPA support the State Board's position and the correctness of the superior court's ruling.

The Board of Education alleged and argues the RRC unreasonably delayed and has objected to or modified *every rule* adopted by the State Board and brought before the RRC since 1986. The State Board is tasked by the People with "constitutional obligations to provide the state's school children with an opportunity for a sound basic education." *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376 (2004).

The members of the RRC are not required to have acquired or demonstrate any background or experience in public education, and need only be endorsed by the Speaker of the House or President of the Senate to serve on the RRC. N.C. Gen. Stat. § 143B-30.1(a) (2015). The asserted RRC delays, review, and rejection of State Board proposals unconstitutionally hinders the State Board's authority and mandate to "make all needed rules and regulations" to meet its constitutionally mandated obligations to "supervise and administer the free public school system and the educational funds provided for its support." N.C. Const. art. IX § 5.

Under the NCAPA, when the RRC strikes down a rule promulgated by the State Board, the only procedural safeguard and remedy is for the State Board to file suit to challenge the RRC in the Wake County Superior Court. *See* N.C. Gen. Stat. § 150B-21.8(d) (2015). This is a wholly untenable process for our school children, our citizens, and for establishing the constitutionally mandated "needed rules and regulations" that are required to implement the public educational policy of our State. N.C. Const. art. IX, § 5.

III. Conclusion

By establishing a Board of Education with the specific constitutional authority to promulgate its own rules and regulations, the framers of Article IX and the People, upon ratifying the Constitution, vested the authority to administer and supervise public education to the State Board, not the RRC. This intention is clearly set forth in the plain language of the Constitution in Article IX. The RRC review process has delayed and frustrated the State Board in accomplishing its constitutionally mandated mission.

The General Assembly cannot prohibit State Board from exercising its rulemaking powers under its constitutional grant of authority. The General Assembly also cannot accomplish the same result by delegating the State Board's constitutional rulemaking authority to a statutory entity the General Assembly has created for review of proposed executive agency rules under the NCAPA.

The State Board's constitutional authority and obligation to "make all needed rules and regulations" for the supervision and administration of the public school system does not function, and is not included, as a statutory or executive rulemaking agency under the NCAPA, with its rules subject to review by the RRC. The NCAPA cannot be applied to trump the constitutional rulemaking authority of the State Board of Education, and subject the State Board to the oversight authority the RRC applies to statutory State agencies.

Defendants have failed to show error in the superior court's judgment. The superior court's grant of summary judgment in favor of the State Board is properly affirmed. I respectfully dissent.

MICHELLE D. SARNO, PLAINTIFF
v.
VINCENT J. SARNO, DEFENDANT.

No. COA16-1267

Filed 19 September 2017

1. Appeal and Error—notice of appeal—untimely

The Court of Appeals treated a notice of appeal as a petition for certiorari, which it granted, where the filing date of the judgment was not clear.

2. Child Custody and Support—child support—deviation from guidelines—findings

Although a trial court's child support orders are afforded substantial deference, the trial court in this case failed to make the requisite findings to support deviation from the Child Support Guidelines.

3. Attorney Fees—child support action

A trial court order awarding attorney fees in a child support action met the requisite requirements where it found that defendant

was an interested party acting in good faith and had insufficient funds to defray the cost of the suit.

4. Attorney Fees—award—ability to pay—estates of the parties

An award of attorney fees does not require a comparison of the relative estates of the parties.

5. Attorney Fees—response to writ of mandamus

The trial court did not err by awarding defendant attorney fees for a response to plaintiff's writ of mandamus where plaintiff alleged that the response was unnecessary and moot. Notwithstanding any alleged errors in two findings, the remaining finding showed that the trial court did not abuse its discretion. Moreover, while the petition may have been moot, it could not be said that defendant's filing was wholly unnecessary.

6. Costs—not requested in pleadings—supporting evidence not challenged

The trial court did not err by awarding defendant costs in a child support action where defendant did not plead a request for costs. Defendant was entitled to the relief justified by the allegations in the pleadings, and plaintiff challenged only the findings for being without a legal basis and not for lack of supporting competent evidence.

7. Child Custody and Support—overpayment—findings not supported by evidence

The evidence did not support a credit for overpayment of child support where neither plaintiff nor defendant testified; counsel's arguments are not evidence.

Judge MURPHY dissenting.

Appeal by Plaintiff from order entered 24 April 2013 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 9 August 2017.

Plumides, Romano, Johnson & Cacheris, PC, by Richard B. Johnson, for plaintiff-appellant.

Krusch & Sellers, P.A., by Leigh B. Sellers, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Michelle D. Sarno ("Plaintiff") appeals an order awarding child support, attorney's fees, and costs to her ex-husband, Vincent J. Sarno ("Defendant"). On appeal, Plaintiff argues the trial court committed the following errors: (1) deviating from the North Carolina Child Support Guidelines ("the Guidelines") without making the proper findings; (2) awarding Defendant attorney's fees; (3) awarding Defendant costs; and (4) crediting Defendant for overpaying child support. We vacate and remand in part and affirm in part.

I. Factual and Procedural Background

This case arises from a protracted dispute between Plaintiff and Defendant. Plaintiff and Defendant married on 15 July 2000 and have one child together. Plaintiff works as a teacher, and Defendant works at Rack Room Shoes, "in an accounting capacity." During the summer of 2006,[1] the parties separated.

On 3 March 2009, Plaintiff filed a complaint, seeking child custody, child support, and equitable distribution of the parties' property. On 14 March 2009, Defendant filed an answer and motion to dismiss. On 23 September 2009, the trial court entered an order for temporary child support. The trial court directed Defendant pay Plaintiff $558.31 monthly in child support. On or about 16 June 2010, the parties entered into a consent order for equitable distribution. On 15 September 2010, Defendant filed an amended answer and counterclaim. Defendant requested child custody, child support, and attorney's fees. Defendant alleged Plaintiff "repeated a desire" to move away, possibly to Vermont.

On 6 and 7 June 2011, the trial court began trial for child custody, child support, and attorney's fees. On 14 June 2011, the trial court rendered its judgment in open court, and referenced findings of fact it would make in a later order. On 11 August 2011, the trial court held a hearing to address "some issues that have come up with the visitation and custody schedule[,]" child support, and attorney's fees.

On 31 August 2011, *nunc pro tunc* to 14 June 2011, the trial court entered an order terminating temporary child support. Plaintiff filed a petition for a writ of mandamus in October 2011, requesting the trial court to issue "its finding of fact or its 'other reasons' for its [August 2011] ruling." The trial court held a hearing on 19 October 2011. At the hearing, the trial court stated it was "uncertain as to whether [it has]

1. Plaintiff asserted the parties separated on 6 July 2006. Defendant initially asserted the parties separated on 31 August 2006. In his amended answer and counterclaim, Defendant described the date of separation as "on or about mid-August of 2006."

any authority whatsoever on that case at [that] point." Although the trial court had "findings of fact ready[,]" it was unsure how to proceed, due to the procedural posture of the case.

On 23 March 2012, the trial court entered an order of permanent child custody, specifically reserving the issue of child support for later determination. The trial court found Plaintiff, now engaged to a man from Vermont, still "explored" the Vermont area as a possible new home. Additionally, Plaintiff planned to relocate to Vermont around 15 July 2011, and "expressed minimal, if any, concern about the effect [her] move away from [the child] would have on [the child]." The trial court expressed "concern[ ]" and noted Plaintiff's "failure to give recognition to [the child]'s need for stability and a relationship with both parents[.]" Accordingly, the trial court ordered the parties to share joint, legal custody. The trial court awarded Defendant primary physical custody, starting at Plaintiff's relocation on 15 July 2011, and Plaintiff secondary physical custody. In the order, the trial court concluded "[t]here was insufficient time to hear evidence and rule on claims for child support and attorney fees and the court retains jurisdiction to rule on this issue."

On 24 July 2012, Plaintiff filed a motion to modify child custody. Plaintiff alleged a change of circumstances, namely she planned to remain in North Carolina, instead of moving to Vermont, as stated at the June 2011 hearings.

On 14 September 2012, the trial court resumed trial to determine permanent child support. The hearing largely consisted of arguments from counsel, not testimony from either party.

On 24 April 2013, the trial court entered an order for permanent child support and attorney's fees. The trial court found Plaintiff's motion to modify custody was still pending. Additionally, the trial court found the parties deviated from the visitation schedule set in the custody order. Because Plaintiff did not move to Vermont, as originally maintained, Plaintiff exercised additional weekend visitation. However, the trial court found "[Plaintiff]'s testimony of her overnights did not convince the court of an exact amount of parenting time." Additionally, Defendant's theory for calculating overnights "was confusing." The trial court based its child support "on the current order and practice of the parties[,]" although a motion to modify custody was pending.

The trial court calculated child support should be "between a Worksheet A and a Worksheet B[.]" The trial court calculated the monthly child support amount at $380.50, between 15 July 2011 and 31 December

2011. The trial court awarded Defendant $425.00 in monthly child support, effective 1 January 2012. The trial court also awarded Defendant $2,000 for "reimbursement of overpayment of child support[.]" The trial court ordered Plaintiff to pay $9,400 in attorney's fees and costs.

On 20 May 2013, Defendant's counsel filed a certificate of service for the 24 April 2013 order. On 19 and 28 June 2013, Plaintiff and Defendant filed notices of appeal, respectively.

In an opinion filed 19 August 2014 and an order entered 10 September 2014, this Court dismissed Plaintiff's and Defendant's appeals regarding the order for permanent child support and attorney's fees. *Sarno v. Sarno*, 235 N.C. App. 597, 762 S.E.2d 371 (2014). This Court held the appeals were interlocutory, because the child support order was a temporary order. *Id.* at 599-601, 762 S.E.2d at 372-74.

On 16 April and 14 May 2014, the trial court held hearings on Plaintiff's motion to modify child custody. In an order entered 31 October 2014, the trial court modified custody and awarded primary physical and legal custody to Defendant. On 17 November 2014, Defendant filed a "Rule 52 Motion to Amend Findings and to Make Additional Findings; Rule 60 Motion to Correct Clerical Errors[.]" On 1 April 2016, the trial court sent a notice of hearing regarding Defendant's motions. In an order file stamped 19 and 20 April 2016, the trial court dismissed, with prejudice, Defendant's motions, after Defendant's counsel failed to appear at the hearing.

On 20 May 2016, Defendant filed a Rule 60 Motion to correct clerical errors. Defendant requested the trial court strike "with prejudice" from its April order, and dismiss Defendant's motions without prejudice. Additionally, Defendant's counsel alleged she reviewed the court file on 12 May 2016. However, the "Memorandum of Judgment/Order had not yet been filed." On 15 June 2016, Plaintiff filed notice of appeal.

II. Jurisdiction

[1] Defendant alludes to an untimely notice of appeal by Plaintiff. The record evinces confusion regarding the file date of the judgment. The judgment is stamped on both 19 and 20 April 2016. Additionally, the record indicates the judgment was not filed on 12 May 2016. Plaintiff alleges she did not receive the judgment until on or about 20 May 2016. To confuse matters even further, there is no certificate of service attached to the judgment.

Regardless of any defect in Plaintiff's notice of appeal, we treat her appeal as a petition for writ of certiorari. In our discretion, we grant her petition for writ of certiorari and address the merits of her appeal.

III. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation and quotation marks omitted). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute . . . will establish an abuse of discretion." *Wiencek–Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (internal citations omitted). However, "[t]he trial court must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Ludlam v. Miller*, 225 N.C. App. 350, 355, 739 S.E.2d 555, 558 (2013) (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005))

We typically review an award of attorney's fees under N.C. Gen. Stat. § 50-13.6 (2016) for abuse of discretion. However, when reviewing whether the statutory requirements under section 50-13.6 are satisfied, we review *de novo*. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) (citation omitted). Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded. *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citing *Hudson*, 229 N.C. at 472, 263 S.E.2d at 724).

IV. Analysis

We review Plaintiff's contention in four parts: (A) deviation from the Guidelines; (B) attorney's fees; (C) costs awarded to Defendant; and (D) credit for overpayment of child support.

A. Deviation from the Guidelines

[2] Plaintiff argues the trial court failed to make proper findings when it deviated from the Guidelines. We agree.

N.C. Gen. Stat. § 50-13.4(c) (2012)[2] includes a presumption that the trial court shall apply the Guidelines. *Id.* However, if the trial court completes the following four-step process, it may deviate from the Guidelines:

2. We review under the version of the Guidelines effective in 2013, as those were controlling when the trial court entered its order.

> [f]irst, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Spicer, 168 N.C. App. at 292, 607 S.E.2d at 685 (quoting *Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999), *disapproved of on other grounds*, *O'Connor v. Zelinske*, 193 N.C. App. 683, 693, 668 S.E.2d 615, 621 (2008)).

Our Court thoroughly summarized what we review for when a trial court deviates from the Guidelines:

> "[i]f the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.' " *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). "However, upon a party's request that the trial court deviate from the Guidelines . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." *Id.* at 297, 524 S.E.2d at 581; *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993) (stating that "[t]he second paragraph of N.C. [Gen. Stat. §] 50–13.4(c) provides that [,] when a

> request to deviate is made and such evidence is taken, the court should hear the evidence and 'find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support' "). In other words, "evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." *Brooker v. Brooker*, 133 N.C. App. 285, 291, 515 S.E.2d 234, 239 (1999) (quoting *Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985)). In the course of making the required findings, "the trial court must consider 'the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.' " *Beamer*, 169 N.C. App. at 598, 610 S.E.2d at 224 (quoting *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 645, 507 S.E.2d 591, 594 (1998)). "These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685 (quoting *Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914).

Ferguson v. Ferguson, 238 N.C. App. 257, 260-61, 768 S.E.2d 30, 33-34 (2014) (all alterations in original).

Plaintiff argues the trial court erred in deviating from the Guidelines without making the necessary findings. Specifically, Plaintiff argues the order lacks findings "regarding the appropriate amount of Guideline support . . . [or] about the needs of the child and ability of the parties to pay that amount." Defendant agrees the trial court "failed to satisfy steps two, three, or four of the four-step deviation analysis."[3]

The trial court made findings regarding the parties' average monthly incomes, health insurance costs for the child, and work related child care costs for the child. The trial court further found it could deviate from the Guidelines on its own motion. In another finding, the trial court stated, "No evidence as to the actual expenditures of the child outside of

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3. After conceding the trial court erred in its findings, Defendant continues and argues we should direct the trial court to enter child support pursuant to Worksheet A. We decline to make an advisory opinion on *what amount* of child support we believe the evidence warrants, as that is within the discretion of the trial court and not at issue on appeal.

work related child care and health care insurance. There is no evidence of any extraordinary expenses of the child."

The trial court failed to make the requisite findings to support deviation from the Guidelines. Although a trial court's child support orders are accorded substantial deference, the order fails to meet our statutory and case law requirements. Accordingly, we vacate this portion of the order and remand for further findings. The trial court may, in its discretion, conduct a new hearing and receive additional evidence.

B. Attorney's Fees

Plaintiff next argues the trial court erred in ordering her to pay attorney's fees to Defendant. Plaintiff's argument is four-fold, and we address it in three parts: (i) findings supporting the award of attorney's fees; (ii) Plaintiff's arguments regarding the relative income of the parties; and (iii) fees awarded regarding Defendant's response to Plaintiff's petition for a writ of mandamus.

i. Findings Supporting the Award of Attorney's Fees

[3] N.C. Gen. Stat. § 50-13.6 provides:

> [i]n an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

Id. There is a distinction between fee awards in proceedings solely for child support and fee awards in actions involving both custody and support:

> [b]efore a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when

> the action was initiated. On the other hand, when the proceeding or action is for both custody and support, the court is not required to make that finding. A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided.

Spicer, 168 N.C. App. at 296-97, 607 S.E.2d at 687 (citations omitted). Although typically labeled findings, these findings are "in reality, [ ] conclusion[s] of law[.]" *Dixon v. Gordon*, 223 N.C. App. 365, 372, 734 S.E.2d 299, 304 (2012) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985)).

Turning to the attorney's fees, the trial court found, *inter alia*:

> 48. Defendant is an interested party in both the custody of his son and the financial support of his son.
>
> 49. Defendant acted in good faith to object to the Plaintiff's proposed relocation of the child to Vermont.
>
> ….
>
> 51. Defendant has insufficient means to defray the costs of the suit.
>
> 52. Procedurally, this case has been slowed by the heavy case load of the court system, trial strategy decisions by the Plaintiff's counsel, the health issues of prior trial counsel, as well as personal decisions by Plaintiff.
>
> 53. When the case was first set for trial, September 2010, former counsel for plaintiff sought to limit Defendant's evidence or a continuance until such time as Defendant served an amended answer and counterclaim. This delayed the trial.
>
> ….
>
> 55. After receiving an undesirable result in the custody [case], Plaintiff changed course, and opted to stay in North Carolina, presumably believing that this would negate the effects of the Court's ruling.
>
> 56. This created delay in executing an Order resulting from the hearing, as counsel and the Court made decisions as to how procedurally to move forward.

> 57. Plaintiff then filed a Writ of Mandamus which was denied by the Court of Appeals, seeking an Order, despite the fact that it was Plaintiff's actions after trial which had complicated and slowed the process.
>
> 58. Defendant was forced to respond to this filing and incurred additional expenses.
>
> 59. Defendant has depleted all of his inheritance to cover fees and borrowed money from family.
>
> 60. Defendant has no estate, no retirement accounts, or other assets outside of his income.
>
> 61 Defendant supported the child without Plaintiff's assistance since July 15, 2011 and was garnished child support until the middle of September 2011 that went to the Plaintiff pursuant to an earlier child support ordered when she had temporary custody.
>
> 62. Plaintiff acknowledged that she made no payments.

Plaintiff contends the findings "do not reflect the evidence before the Court nor . . . are they sufficient findings of fact." Although Plaintiff recognizes "the trial court's findings of fact have more than the bare statutory language," she asks us to reverse and remand the trial court's award.

We conclude the trial court's order meets the statutory requirements, as it found Defendant is an interested party acting in good faith and has insufficient means to defray the expense of the suit.[4] Additionally, while these findings are properly treated as conclusions, we hold the trial court's conclusions are supported by the evidence. The order includes, in Finding of Fact Number 22, Defendant's gross income. Finding of Fact Number 23 discussed how Defendant "has borne all of the expenses associated with the child while in his primary care." Defendant's counsel filed an affidavit, outlining costs and fees incurred by Defendant in this action. Accordingly, the trial court's order contains more than "a bald statement that a party has insufficient means to defray the expenses of the suit[,]" and does not run afoul of our case law. *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted).

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4. While Plaintiff points to other alleged required findings the trial court must make, we note those additional findings go to the *reasonableness* of the amount of attorney's fees awarded. However, Plaintiff did not appeal the reasonableness of the amount of fees awarded.

ii. The Relative Incomes of the Parties

[4] Plaintiff, throughout her brief and explicitly in assignment of error II. C., asks this Court to consider her ability to pay Defendant's attorney's fees. Plaintiff requests this Court consider and compare the parties' estates when reviewing the trial court's award of attorney's fees. Plaintiff cites to no case law in support of this contention.

We note our case law states "we do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action requires a comparison of the relative estates of the parties" and N.C. Gen. Stat. § 50-13.6 "does not require the trial court to compare the relative estates of the parties[.]" *Van Every v. McGuire*, 348 N.C. 58, 59-60, 497 S.E.2d 689, 690 (1988) (citation omitted).[5] *See also Respess v. Respess*, 232 N.C. 611, 635, 754 S.E.2d 691, 707 (2014) (citations omitted). Accordingly, we hold this assignment of error is without merit.

iii. Fees Regarding Legal Services for the Writ of Mandamus

[5] Plaintiff next argues the trial court erred in awarding attorney's fees related to Plaintiff's Writ of Mandamus. Specifically, Plaintiff argues Defendant's response to her writ of mandamus was "an unnecessary filing[,]" and, thus, Defendant is not entitled to attorney's fees.

Plaintiff argues Findings of Fact Numbers 55 through 62 are unsupported by the evidence. However, Plaintiff does not challenge Finding of Fact Number 65,[6] which states, "A total of $2,920.00 was spent related to responding to the writ of mandamus filed by Plaintiff. I find that Defendant is entitled to an award of $2,900.00 for those fees and expenses."

Plaintiff argues Defendant's response was moot, which he admitted in his response, and, thus, Defendant is not entitled to attorney's fees for the filing. Defendant points to evidence showing the trial court "did not understand the impact of the Petition[.]"

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5. This quote is from the North Carolina Supreme Court's summary of the Court of Appeals' decision. The North Carolina Supreme Court largely approved of the Court of Appeals' opinion and modified the opinion to hold although the trial court does not have to compare the parties' estates, it is permitted to do so. *Van Every*, 348 N.C. at 60, 497 S.E.2d at 690.

6. We note Plaintiff does challenge Finding of Fact Number 65 in her argument regarding costs. However, she does not argue Finding of Fact Number 65 is unsupported by the evidence, and, instead argues there is no legal basis for the finding, because Defendant did not plead for costs, which we discuss *infra*.

As stated *supra* the trial court made the statutorily mandated findings to award attorney's fees. Notwithstanding any alleged errors in Findings of Fact Numbers 55 through 62, the remaining findings show the trial court's decision was not an abuse of discretion. In Defendant's response to Plaintiff's petition for a writ of mandamus, Defendant argued the petition is moot. Defendant then addressed the merits of the petition, in case this Court concluded the petition was not moot. Although the petition may have been moot, we cannot say Defendant's filing was wholly unnecessary. We note the confusion of the trial court regarding its jurisdiction because Plaintiff filed her petition for a writ of mandamus. It was in the discretion of the trial court to award fees for this filing, and we cannot say the trial court's decision to award attorney's fees for Defendant's response to the petition for writ of mandamus was manifestly unsupported by reason. We overrule this assignment of error.

C. Costs Awarded to Defendant

[6] Plaintiff next argues the trial court erred in awarding Defendant $3,500 in costs. Specifically, Plaintiff argues "Defendant-Appellee did not plead a request for costs nor was there a legal basis for costs, therefore, the award of costs to Defendant-Appellee must be reversed." Defendant argues his general prayer for relief in his original answer entitles him to costs.

Rule 8 of the North Carolina Rules of Civil Procedure requires pleadings to contain: "[a] demand for judgment for relief to which he deems himself entitled." N.C. R. Civ. P. 8(a)(2) (2016). However, " '[i]t is well-settled law in North Carolina that the party is entitled to relief which the allegations in the pleadings will justify . . . . It is not necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled.' " *Harris v. Ashley*, 38 N.C. App. 494, 498-99, 248 S.E.2d 393, 396 (1978) (quoting *East Coast Oil Co. v. Fair*, 3 N.C. App. 175, 178, 164 S.E.2d 482, 485 (1968)) (other citations omitted).

We note Defendant filed an amended answer and counterclaim. In his controlling, amended pleading, he neither requests costs nor included a general prayer for relief. *Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (citation omitted) (holding the amended pleading superseded the original pleading and controlled). However, because Defendant is "entitled to relief which the allegations in the pleadings will justify[,]" we affirm the trial court's award of costs to Defendant. *Harris*, 38 N.C. App. at 498-99, 248 S.E.2d at 396 (citation omitted). We note Plaintiff only challenges the findings of fact

supporting the award of costs for being without "a legal basis" and not for lack of supporting competent evidence.[7] Because we hold there is a legal basis for the award, we overrule this assignment of error.

D. Credit for Overpayment of Child Support

[7] Finally, Plaintiff argues the trial court erred in awarding Defendant a $2,000 credit for overpayment of child support. Specifically, Plaintiff contends the trial court did not receive evidence, beyond Defendant's counsel's argument, regarding an overpayment of child support. Essentially, Plaintiff argues Findings of Fact Numbers 39 through 45 are unsupported by the evidence. We agree.

"This Court's review is limited to a consideration of whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations." *Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 918-19 (2002) (citation omitted). However, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

Plaintiff argues the record contains no sufficient, competent evidence to support the following findings:

> Overpayment Temporary Order for Child Support Through Order of Permanent Custody
>
> 39. Pursuant to a temporary Order for child support, entered without prejudice on September 24, 2009, Defendant paid an amount for child support of $558.31, that was a median between a schedule A and B calculations as plaintiff contended that Defendant did not have more than 123 overnights.
>
> 40. At trial in 2011, Plaintiff's own trial Exhibit (10) introduced at the custody trial reveals that Defendant had approximately 140-145 overnights a year and provided 100% of the transportation for his visits with the minor child, in addition to health insurance and a portion of a secondary policy that Mother provided, which the court ultimately found unnecessary.

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7. Additionally, we note Plaintiff does not argue the types of costs awarded were not permitted by statute. It is not our duty to supplement a party's brief. N.C. R. App. P. 28(a) (2016).

41. Defendant seeks a reimbursement of overpayment of child support and asks the Court to assume that he should have paid the worksheet B number included in the temporary order.

42. Defendant paid child support via wage withholding pursuant to this temporary order through September 2011 although an order terminating his support effect July 15, 2011 was entered in August 2011.

43. Defendant claims that from the entry of the order effective August 2009, through the order terminating his child support obligation, he over paid child support in the amount of $4,392.00 based on the number calculated for a B within the order.

44. The Court finds that it is appropriate to give the Defendant some credit for paying more than the guideline amount.

45. The Court finds that it will be too burdensome to have Plaintiff repay all of the overages paid and finds in its discretion to award a credit of less than one half that amount, the sum of $2,000.00.

Plaintiff contends "there was no evidence offered regarding Defendant-Appellee's alleged overpayment of child support" beyond arguments from counsel at the 14 September 2012 hearing. Defendant argues the 14 September 2012 hearing "was the resumption of testimony and evidence presented on June 6 & 7 2011[.]" Defendant then highlights portions of testimony from the 6 and 7 June 2011 hearings.

We conclude there is insufficient evidence in the record to support the findings regarding Defendant's overpayment of child support. Neither Plaintiff nor Defendant presented testimony at the 14 September 2012 hearing regarding Defendant's overpayment. Although Defendant's counsel argued Defendant overpaid under the Guidelines worksheet B amount, counsel's arguments are not evidence. *Collins*, 345 N.C. at 173, 478 S.E.2d at 193 (citations omitted). Additionally, the record does not include the transcripts from the 6 or 7 June 2011 hearings, to which Defendant cites. We are bound by the record on appeal. *In re Savage*, 163 N.C. App. 195, 196, 592 S.E.2d 610, 610-11 (2004) (citation omitted). Thus, we hold the trial court's findings are not supported by the evidence. Accordingly, we vacate this portion of the order and remand for further findings. The trial court may, in its discretion, conduct a new hearing and receive additional evidence.

V. Conclusion

For the reasons stated above, we remand the trial court's deviation from the Guidelines and award of overpayment of child support for further findings consistent with this opinion. We affirm the trial court's award of attorney's fees and costs to Defendant.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judge DAVIS concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting

I agree with the Majority's analysis of the merits of this case. However, I do not join the Majority in treating the Appellant's brief as a petition for writ of *certiorari* as she failed to request for us to do so or file a petition in conformity with N.C. R. App. P. 21(a) and consequently would not reach the merits. I am persuaded that this situation is no different from the situation in the unpublished decision we issued in *State v. Scott*, No. COA 15-559, ___ N.C. App. ___, 781 S.E.2d. 351, 2015 WL 8750613 (N.C. Ct. App. December 15, 2015) (unpublished), applying *State v. Inman*, 206 N.C. App 324, 696 S.E.2d. 567 (2010). Further, I "decline to exercise [my] discretion under Rule 2 to correct the defects in [Appellant]'s purported petition for writ of *certiorari*." *State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005). "It is not the role of the appellate courts . . . to create an appeal for an [A]ppellant." *Krause v. RK Motors, LLC*, ____ N.C. App. ___, ____, 797 S.E.2d. 335, 339 (2017) (citing *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d. 360, 361 (2005)). Accordingly, I respectfully dissent and would dismiss the appeal.

SILVER v. HALIFAX CTY. BD. OF COMM'RS

[255 N.C. App. 559 (2017)]

LOTONYA SILVER, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF BRIANNA SILVER, LARRY SILVER, III AND DOMINICK SILVER; BRENDA SLEDGE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ALICIA JONES; FELICIA SCOTT, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JAMIER SCOTT; HALIFAX COUNTY BRANCH #5401, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND COALITION FOR EDUCATION AND ECONOMIC SECURITY, PLAINTIFFS

v.

THE HALIFAX COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA16-313

Filed 19 September 2017

Schools and Education—right to sound basic public education—local board of county commissioners not responsible

The trial court did not err by granting a local board of county commissioners' motion to dismiss under Rule 12(b)(6) of a claim by North Carolina schoolchildren asserting a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, based on the board's alleged failure to adequately fund certain aspects of public schools. The board did not bear the constitutional duty to provide a sound basic education, and the correct avenue for addressing plaintiffs' concerns in the present case was through the ongoing litigation in *Leandro I* and *Leandro II*.

Chief Judge McGEE dissenting.

Appeal by plaintiffs from order entered 2 February 2016 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County. Heard in the Court of Appeals 19 September 2016.

UNC Center for Civil Rights, by Mark Dorosin and Elizabeth Haddix, for plaintiffs-appellants.

Yarborough, Winters & Neville, by Garris Neil Yarborough; Office of County Attorney, by County Attorney M. Glynn Rollins, Jr., for defendant-appellee.

Youth Justice Project of the Southern Coalition for Social Justice, by K. Ricky Watson, Jr. and Peggy Nicholson, for Public Schools First NC, amicus curiae.

Legal Aid of North Carolina, Inc., by George R. Hausen, Jr.; Legal Aid of North Carolina, Inc. - Advocates for Children's Services, by

Seth Ascher and Jennifer Story, for Legal Aid of North Carolina, Inc., amicus curiae.

STROUD, Judge.

I. Introduction

The North Carolina Supreme Court described the State's constitutional obligation to provide each student a "sound basic education" in *Leandro v. State*[1], which was filed in 1997; the Halifax County Board of Education was one of several plaintiffs in that case. In *Leandro I*, our Supreme Court declared that the State bears the constitutional obligation to provide a "sound basic education" to each student; the Court then explained in later *Leandro* litigation that "by the State we mean the legislative and executive branches[.]"[2] The legislative branch is the North Carolina General Assembly; the executive branch includes the Governor, State Board of Education, and Department of Public Instruction. The Supreme Court also explained that our state courts are not well-equipped to solve the problems in North Carolina's public schools. The Court approved of the trial court's approach, which deferred to "the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process."[3] The Supreme Court then assigned a superior court judge to oversee the efforts to improve public education in several counties, including Halifax County, and the court oversight started by *Leandro* still continues today.

In this case, plaintiffs are students in the Halifax County Public Schools and organizations interested in promoting public education. They claim that despite years of *Leandro* court oversight, including countless hearings and orders by the trial court and two extensive opinions from the North Carolina Supreme Court, many of the educational deficiencies described in *Leandro I* and *II* still exist in Halifax County. But in this case, plaintiffs claim that the Halifax County *Board of Commissioners* -- alone -- bears the constitutional obligation for providing all children in the county with a sound basic education. This claim is not supported by our Supreme Court's holdings in *Leandro I* and *II*. And the courts are still ill-equipped to solve the problems of North Carolina's

1. *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*").

2. *Id.* at 345, 488 S.E.2d at 254; *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 635, 599 S.E.2d 365, 389 (2004) ("*Leandro II*").

3. *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 390.

public schools today, while the State -- "the legislative and executive branches" -- still has the constitutional duty to provide a sound basic education for every child in North Carolina. The defendant Halifax County Board of Commissioners was created by the State, and the State has legal power to control it. Plaintiffs' complaint describes serious problems in the schools in Halifax County, but because this defendant -- the Halifax County Board of Commissioners -- does not bear the constitutional duty to provide a sound basic education, we affirm the trial court's order dismissing this action.

II. Plaintiffs' claim

a. Procedural background

This case presents a question of first impression in our Court: whether North Carolina schoolchildren may assert a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, against a local board of county commissioners for their alleged failure to adequately fund aspects of public schools. This case has come before this Court at an early stage of the proceedings, as the trial court granted defendant's motion to dismiss under Rule 12(b)(6). At this early stage, this Court must take the factual allegations from plaintiffs' complaint, and treat them as true to determine the legal question of whether the trial court properly dismissed this case. *See Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (noting that in an appeal from a trial court's grant of a motion to dismiss under Rule 12(b)(6), "[w]e consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." (citation and quotation marks omitted)).

Brianna Silver, Larry Silver III, Dominick Silver, Alicia Jones, and Jamier Scott ("the students") are five students in school systems within the geographic boundaries of Halifax County, North Carolina. Latonya Silver, Brenda Sledge, and Felicia Scott are the students' respective parents or legal guardians. The students and their parents and legal guardians, as well as with two interested organizations -- the local chapter of the National Association for the Advancement of Colored People and the Coalition for Education and Economic Security (collectively, "plaintiffs") -- filed a complaint against the Halifax County Board of Commissioners ("defendant" or "the Board") asserting that the Board's ineffective and inefficient allocation of financial resources resulted in a failure to provide a "sound basic education" to all school children within Halifax County, and that such failure violated the students' rights under Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution.

Plaintiffs filed their lawsuit in Halifax County Superior Court on 24 August 2015. In their complaint, plaintiffs asserted that, due to the "educational deficiencies" in the three Halifax County school districts, "merely adding resources to the defective three-district system cannot remedy its constitutional deficiencies." Plaintiffs also claim that the Board's "decision to maintain three racially identifiable school districts prevents students from the opportunity to receive a sound basic education." Plaintiffs asserted two claims for relief, both based on Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and requested in part: (1) "[t]hat the Court find and conclude that Defendant's maintenance of three separate school districts obstructs Halifax County's students from securing the opportunity to receive a sound basic education;" and (2) "[t]hat the Court exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education[.]"

Under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, this case was designated as exceptional by the Chief Justice of the Supreme Court of North Carolina, and a special superior court judge was designated to hear the case. Defendant moved to dismiss plaintiffs' complaint under Rule 12(b)(6) on 2 November 2015, asserting that the complaint failed to state a claim upon which relief may be granted. After a hearing, the trial court granted defendant's motion to dismiss under Rule 12(b)(6), reasoning it is not "the constitutional responsibility of [the Board] to implement and maintain a public education system for Halifax County." Plaintiffs appealed to this Court.

b. Facts as alleged by plaintiffs

We recite these factual allegations from plaintiffs' complaint and treat them as true for the purposes of our decision. *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796. Three separate school districts exist wholly within the geographical boundaries of Halifax County: Halifax County Public Schools ("Halifax County Schools"), Weldon City Schools ("Weldon City Schools"), and Roanoke Rapids Graded School District ("Roanoke Rapids Schools"). This tripartite school system was created in the 1960s.

As of 2015, the student population of Halifax County Schools was 85% African-American and 4% Caucasian; the student population of Weldon City Schools was 94% African-American and 4% Caucasian; and the student population of Roanoke Rapids Schools was 26% African-American and 65% Caucasian. According to plaintiffs' complaint, the three school

districts receive an unequal amount of funding, with Roanoke Rapids Schools -- the only school district with a majority of Caucasian students -- receiving the most financial support. Plaintiffs allege this funding disparity flows directly from the choices made by the Board.

Plaintiffs also allege the Board has financial responsibility for public education in Halifax County, and has the authority to use local revenues to maintain or supplement public school programs. Various North Carolina General Statutes assign to local governments the responsibility to pay for certain school-related expenditures for the school districts within its borders; the complaint alleges that the Board is responsible for providing furniture and apparatus needs; library, science, and classroom equipment; instructional supplies and books; and water supply and sanitary facilities. To fund these financial responsibilities, North Carolina law allows local governments, if they choose, to collect a one-cent sales and use tax. N.C. Gen. Stat. § 105-463 *et seq.* This tax is collected by retailers and remitted to the North Carolina Department of Revenue. N.C. Gen. Stat. §§ 105-469(a); 105-471 (2015). The Secretary of the Department of Revenue then allocates the net proceeds of the taxes collected to each individual county. N.C. Gen. Stat. § 105-472 (2015).

In distributing the local government sales and use tax proceeds, the General Statutes allow the Board, by resolution, to choose one of two methods of tax distribution: the Per Capita Method, or the Ad Valorem Method. *See* N.C. Gen. Stat. §§ 105-472(b)(1)-(2) (2015). For counties that choose the Per Capita Method, the "net proceeds of the [sales and use] tax collected in a taxing county" is distributed "to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county." N.C. Gen. Stat. § 105-472(b)(1). For counties using the Ad Valorem Method, the "net proceeds of the [sales and use] tax collected in a taxing county" is distributed "to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution." N.C. Gen. Stat. § 105-472(b)(2). According to the complaint, both Roanoke Rapids Schools and Weldon City Schools levy ad valorem "supplemental property taxes," while Halifax County Schools do not.

The Board distributes local sales and use tax revenue under the Ad Valorem Method. Plaintiffs' complaint alleges that because the Board chooses the Ad Valorem Method, a funding disparity exists among the three school districts. Between 2006 and 2014, it is alleged that Roanoke Rapids Schools received approximately $4.5 million in local sales and use

tax revenue, Weldon City Schools received approximately $2.5 million in local sales and use tax revenue, and Halifax County Schools received no local sales and use tax revenue, because it does not collect ad valorem taxes and was therefore not entitled to a share of the local sales and use taxes distributed under the Ad Valorem Method. Plaintiffs allege the Board has "repeatedly refused to adopt" the Per Capita Method, "preferring to maintain a public education system that denies additional funding" to Halifax County Schools.

The Board's choice not to adopt the Per Capita Method "exacerbates funding disparities already in place," according to plaintiffs, by the fact that Roanoke Rapids Schools and Weldon City Schools collect ad valorem supplemental property tax revenue, while Halifax County Schools does not. Roanoke Rapids Schools has "authority to levy its own taxes," and plaintiffs allege it set a supplemental property tax rate at $0.21 per $100.00 of taxable property value within the school district, which resulted in Roanoke Rapids Schools receiving approximately $15 million in additional revenue through supplemental property taxes between 2006 and 2014. Plaintiffs allege Weldon City Schools "relies on the Board to set its supplemental property tax rate," and the Board set the rate at $0.17 per $100.00 of taxable property value, resulting in Weldon City Schools receiving approximately $11 million in additional revenue through supplemental property taxes during the same time period. In contrast, Halifax County Schools do "not have a supplemental property tax and thus receive[ ] no additional revenue," according to plaintiffs' complaint. Plaintiffs allege these funding disparities have had an appreciable effect on each of the school districts' facilities, quality of teachers, and learning materials, briefly summarized below.

The complaint alleges that many of Halifax County Schools' buildings are in subpar condition, resulting in: toilets flooding hallways, forcing students to walk through sewage to travel between their lockers and classes; a ceiling occasionally crumbling and falling onto students' desks mid-lesson; heating and air conditioning systems regularly failing; and school buses breaking down, affecting class schedules and school attendance. The complaint further alleges that Weldon City Schools are not much better off. The high school in the Weldon City School system has a mold infestation, crumbling ceilings, an invasive pest problem, and rodents. An elementary school in the Weldon City Schools system has bathrooms with no bathroom stall doors and routinely has no soap in the soap dispensers. Plaintiffs allege, in stark contrast, that Roanoke Rapids Schools have been renovated regularly; feature computer labs,

art rooms, music rooms, and physical education spaces; and have "pristine athletic field[s]."

Plaintiffs also allege that disparities extend to the quality of the faculty in the three school districts. They allege Halifax County Schools and Weldon City Schools (together, the "majority-minority districts") are "unable to attract and retain a sufficient number of experienced, highly effective, or qualified teachers." The complaint alleges 40 percent and 50 percent of the school districts' teachers, respectively, reported that they have insufficient access to appropriate instructional materials, while only five percent of Roanoke Rapids Schools teachers reported the same problems. Plaintiffs allege the majority-minority districts must resort to teachers provided through Teach For America ("TFA"), while Roanoke Rapids Schools have no TFA teachers placed in its schools.

Plaintiffs further allege differences between the three school districts' learning materials, curricular offerings, and extracurricular activities, with students in the majority-minority districts being "frequently forced to share old and worn down textbooks, workbooks, and other classroom materials[,]" and students are not permitted to take those materials home, making it difficult to complete homework assignments. Students in the majority-minority districts have minimal access to advanced academic courses. In contrast, students in Roanoke Rapids Schools have access to an "Outreach Academy" program designed to decrease the dropout rate, have wide access to advanced academic placement, and can participate in "educational inputs like extracurricular and athletic offerings[.]"

In addition, plaintiffs allege that the school funding choices made by the Board have also had a negative impact on student test scores in the three districts. Since 2008, Halifax County Schools and Weldon City Schools have had no more than 31.7% and 47.7%, respectively, of their students score at or above grade level on statewide standardized tests. They allege students in these two school districts have consistently scored significantly lower on the SAT college entrance exams than their peers at Roanoke Rapids Schools. While students at Roanoke Rapids Schools have fared better, all three districts have higher dropout rates than the state average, with half of the dropouts in Roanoke Rapids Schools being African-American, despite that group constituting less than 25 percent of the total student population.

III. Analysis

a. The *Leandro* cases established a constitutional right to a sound basic education.

"[T]he right to education provided in the state constitution is a right to a sound basic education. Leandro I, 346 N.C. at 345, 488 S.E.2d at 254.

Plaintiffs argue that their complaint, taken as true, states a claim against defendant for violating their rights conferred by Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and the Board's choices "deprived Plaintiffs of their constitutionally-guaranteed opportunity to receive a sound basic education." "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 253. To determine whether plaintiffs' claims against the Board, if true, constitute a violation of the North Carolina Constitution, we first consider the language of the two constitutional provisions involved. Article I, Section 15 of the North Carolina Constitution provides: "**Education**. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15 (emphasis in original). Article IX, section 2 provides:

> Uniform system of schools.
> (1) **General and uniform system: term**. -- The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
>
> (2) **Local responsibility**. -- The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

N.C. Const. art. IX, § 2 (emphasis in original). The contours of these constitutional provisions have been examined in two landmark opinions of our Supreme Court: *Leandro I*, 346 N.C. 336, 488 S.E.2d 249; and *Leandro II*, 358 N.C. 605, 599 S.E.2d 365.

In *Leandro I*, students, their parents or legal guardians, and their school districts[4] ("the plaintiffs"), sued the State and the North Carolina State Board of Education ("SBOE") (collectively, "the defendants") alleging: (1) that the children in five relatively poor school districts had a right to adequate educational opportunities which the defendants had denied under the then-existing school funding system; and (2) the North Carolina Constitution "not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities." 346 N.C. at 342, 488 S.E.2d at 252. Much like the present case, the plaintiffs in *Leandro I* "complain[ed] of inadequate school facilities with insufficient space, poor lighting, leaking roofs, erratic heating and air conditioning, peeling paint, cracked plaster, and rusting exposed pipes." *Id.* at 343, 488 S.E.2d at 252. The plaintiff school districts asserted that "they [were] unable to compete for high quality teachers because local salary supplements in their poor districts [were] well below those provided in wealthy districts." *Id.*

After examining the plain language, purpose, and history of Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, our Supreme Court held these provisions provide a right to "a qualitatively adequate education[.]" *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254. The Court explained:

> Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational

4. One of the plaintiffs was the Halifax County Board of Education. *Leandro I*, 346 N.C. at 336; 488 S.E.2d at 249.

> training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro I, 346 N.C. at 347, 488 S.E.2d at 255 (citations omitted).

In addition to considering the qualitative aspect inherent in the two constitutional provisions when combined, the Supreme Court also considered whether the equal opportunities clause of Article IX, Section 2, alone, "mandates equality in the educational programs and resources offered the children in all school districts in North Carolina." *See Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255. In answering that question in the negative, the Court explained:

> The issue here . . . is [the] plaintiffs' contention that North Carolina's system of school funding, based in part on funding by the county in which the district is located, necessarily denies the students in plaintiffs' relatively poor school districts educational opportunities equal to those available in relatively wealthy districts and thereby violates the equal opportunities clause of Article IX, Section 2(1). Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided equally in every school district, we are convinced that the equal opportunities clause of Article IX, Section 2(1) *does not require substantially equal funding or educational advantages in all school districts*. . . . [W]e conclude that provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles.

Leandro I, 346 N.C. at 348-49, 488 S.E.2d at 256 (emphasis added). Our Supreme Court also addressed local responsibility for school funding, and held that differences in school funding between school districts resulting from local supplements do not violate Article IX, Section 2(2):

> Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools. Further, it expressly provides that local governments may add to or supplement their school programs as much as they wish. . . . Because the North

> Carolina Constitution expressly states that units of local governments with financial responsibility for public education may provide additional funding to supplement the educational programs provided by the state, *there can be nothing unconstitutional about their doing so or in any inequality of opportunity occurring as a result.*

Leandro I, 346 N.C. at 349-50, 488 S.E.2d at 256 (emphasis added). This holding was grounded, in part, in practical concerns; because the Constitution permits local supplements, " '[c]learly . . . a county with greater financial resources will be able to supplement its programs to a greater degree than less wealthy counties, resulting in enhanced educational opportunity for its students. [Article IX, Section 2(2)] obviously precludes the possibility that exactly equal educational opportunities can be offered' " in all school districts throughout the State. *Id.* at 350, 488 S.E.2d at 256 (quoting *Britt v. N.C. State Bd. of Educ.*, 86 N.C. App. 282, 288, 357 S.E.2d 432, 435-36 (1987)) (ellipses and brackets omitted).

Upon concluding that the plaintiffs had stated a claim upon which relief could have been granted, our Supreme Court held that "[i]f on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Id.* at 357, 488 S.E.2d at 261. Unless the State could show that its actions denying a fundamental right were necessary to promote a compelling governmental interest, the Court held that it would be "the duty of the [trial] court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government." *Id.* (citation omitted).

As directed by *Leandro I*, on remand the trial court heard extensive evidence and ultimately entered a declaratory judgment favorable to the *Leandro* plaintiffs; our Supreme Court considered the appeal of that judgment in *Leandro II*. *Leandro II*, 358 N.C. at 612-13, 599 S.E.2d at 375. In *Leandro II*, our Supreme Court encountered a "continuation of the landmark decision by this Court, [*Leandro I*,] unanimously interpreting the North Carolina Constitution to recognize that the legislative and executive branches have the duty to provide all the children of North Carolina the opportunity for a sound basic education." *Leandro II*, 358 N.C. at 609, 599 S.E.2d at 373. The Court considered, for the first time, what measures are to be used to determine whether a student's right to a sound basic public education had been violated.

While the plaintiffs in *Leandro I* and *Leandro II* hailed from many poor school districts in North Carolina -- including Halifax County -- the evidence primarily focused on a single district, Hoke County, which was designated as a "representative plaintiff district." *See id.* at 613, 599 S.E.2d at 375. The Court noted that the evidence presented by the *Leandro II* plaintiffs included four general types of evidence: "(1) comparative standardized test score data; (2) student graduation rates, employment potential, post-secondary education success (and/or lack thereof); (3) deficiencies pertaining to the educational offerings in Hoke County schools; and (4) deficiencies pertaining to the educational administration of Hoke County schools." *Id.* at 623, 599 S.E.2d at 381. The Court called the first two categories "outputs," and the second two categories as "inputs." *Id.* "Outputs" is "a term used by educators that, in sum, measures student performance[,]" while "inputs" is "a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools." *Id.*

After discussing the evidence in the case regarding "outputs" and "inputs," our Supreme Court held that the plaintiffs had made a "clear evidentiary showing" of the inadequacy of both. *See id.* at 630, 599 S.E.2d 386. The Court stated:

> In our view, the trial court conducted an appropriate and informative path of inquiry concerning the issue at hand. After determining that the evidence clearly showed that Hoke County students were failing, at an alarming rate, to obtain a sound basic education, the trial court in turn determined that the evidence presented also demonstrated that a combination of State action and inaction contributed significantly to the students' failings. Then, after concluding that the State's overall funding and resource provisions scheme was adequate on a statewide basis, the trial court determined that the evidence showed that the State's method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro's* mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education.

Id. at 637, 599 S.E.2d at 390. Accordingly, our Supreme Court affirmed "those portions of the trial court's order that conclude[d] that there [had] been a clear showing of a denial of the established right of Hoke County students to gain their opportunity for a sound basic education" and also affirmed the portions of the order which required "the State to

assess its education-related allocations to the county's schools so as to correct any deficiencies that . . . prevent[ed] the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.* at 638, 599 S.E.2d at 391.

With these principles in mind, we consider plaintiffs' complaint. In their complaint, plaintiffs allege that Halifax County Schools and Weldon City Schools lack the necessary resources to provide fundamental educational opportunities to the children in their school districts. Plaintiffs further complain of inadequate school facilities, crumbling ceilings, leaking pipes, sewage in the hallways, and a lack of adequate instructional materials in the majority-minority districts. These deficiencies result from defendant's funding choices and have led to poor test scores and the inability to retain qualified teachers. Plaintiffs requested, in their complaint, that the Court "exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education."

The educational deficiencies as described in the plaintiffs' complaint, which we accept as true for the motion to dismiss, are serious and intolerable. But rather than filing this separate lawsuit, the correct avenue for addressing plaintiffs' concerns in the present case would appear to be through the ongoing litigation in *Leandro I* and *Leandro II*. The *Leandro* cases defined not only the essential requirements for a "sound basic education" under the North Carolina constitution, but also the entities with the constitutional responsibility to provide that education. In addition, these cases answer the essential question in this case of whether a local board of county commissioners has the constitutional obligation for providing a sound basic public education for the students in its county. The Halifax County schools are addressed in many orders in the ongoing court supervision in the *Leandro* cases. As noted above, several plaintiffs in *Leandro I* and *II* are local boards of education, including the Halifax County Board of Education. *See Leandro I*, 346 N.C. at 346, 488 S.E.2d at 249; *Leandro II*, 358 N.C. at 605, 599 S.E.2d at 365. Furthermore, plaintiffs' complaint refers to a 2009 consent order that "determined that students in HCPS were not being provided the opportunity to receive a sound basic education and required the North Carolina Department of Public Instruction's [sic] ('DPI') to implement a 'turnaround' intervention plan in HCPS." Oddly, the complaint does not identify the case or court in which the "2009 consent order" was entered, but we believe it is entirely appropriate for this Court to take judicial notice it was a court order in the ongoing *Leandro* litigation.

On plaintiffs' argument that this defendant -- a county board of commissioners -- has the constitutional obligation to provide a sound basic education, we cannot lose sight of the fact that the *Leandro* cases began as a declaratory judgment action with the express purpose of determining the extent of the state constitutional right to a sound basic education *and* the entities responsible for providing that education. *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374. *Leandro I* and *Leandro II* determined the correct parties and the entities legally responsible for providing a sound basic education under the North Carolina Constitution; county commissioners were not included as parties in either case. *Leandro II* addressed the responsibilities of the various entities -- the State, the local school boards, and the State Board of Education -- and held that the local entities, as creatures of the State, did *not* bear the constitutional obligation regarding education, yet found the school boards to still be proper parties to the ongoing litigation, since the case was based significantly on their role as the providers of education and the outcome would have a great effect on that role. *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. In *Leandro II*, the Supreme Court also clarified that the constitutional duty is on the State, and "by the State we mean the legislative and executive branches which are constitutionally responsible for public education[.]" *Id.*. at 635, 599 S.E.2d at 389. Although the county boards of commissioners were not parties to *Leandro I* or *II*, they are creatures of the State just as the local school boards.

We cannot discern why deficiencies in education alleged here have not been raised with the superior court in the ongoing *Leandro II* matter. And even if these particular deficiencies cannot be addressed in the ongoing *Leandro II* case, plaintiffs simply have not stated a constitutional claim against *this* defendant, the Halifax County Board of Commissioners, because *this* defendant on its own does not have the constitutional duty identified in *Leandro I* to provide a sound basic education. The State does, *and the State has total control over this defendant.* We will review briefly the basic principles of *Leandro I* and *II* specifically as applied to the plaintiffs' claims and the schools in Halifax County.

b. *Leandro I* and *II* established that the State is constitutionally responsible for public education.

"*[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education.*" *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389.

The seminal case in North Carolina which establishes the constitutional right to sound basic education is *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254, with further analysis and clarification in *Leandro II*, 358 N.C. at 614-15, 599 S.E.2d at 376. The questions of how to correct educational deficiencies and which entities bear the responsibility for improving education have been addressed many times and in excruciating detail in *Leandro I*, *Leandro II*, and continuing litigation that has followed these decisions over the years.[5] *Leandro I*, as described in *Leandro II*, was "initiated as a declaratory judgment action pursuant to [N.C. Gen. Stat.] § 1-253 (2003)." *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374.

> [T]he case included five distinct parties: (1) plaintiff school children (and their respective guardians), (2) plaintiff local school boards, (3) plaintiff-intervenors, (4) the State Board of Education, and (5) the State. *At that juncture, all participants sought a decree defining what rights and obligations were at stake, which parties had obligations, and which parties had rights as a result of such obligations*. In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state's school children with an opportunity for a sound basic education, and that the state's school children had a fundamental right to such an opportunity. As a result of the decree, adversarial sides were clearly drawn for four of the five parties -- plaintiff school children and plaintiff-intervenor school children (who, under the decree, enjoyed the right of educational opportunity), versus the State and State Board of Education (which, under the decree, were obligated to provide such opportunity).

Id. at 614-15, 599 S.E.2d at 376 (citation omitted) (emphasis added). One of the plaintiff school boards in *Leandro I* and *II* was -- and still is

5. The Supreme Court noted in *Leandro II* that "the ensuing trial [on remand in *Leandro I*] lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages. The time and financial resources devoted to litigating these issues over the past ten years undoubtably [sic] have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education." *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 373.

-- the Halifax County Board of Education. *Leandro I*, 346 N.C. at 336, 488 S.E.2d at 249.

In *Leandro II*, the Supreme Court addressed an issue which developed after the *Leandro I* ruling regarding the status of the school boards as parties, since "as state-created entities, they enjoyed no entitlement to the right established in *Leandro* -- namely, a child's individual right of an opportunity to a sound basic education." *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. In the *Leandro I* and *II* litigation, the school boards being complained about were plaintiffs, not defendants, but the Supreme Court nevertheless considered the proper constitutional role and responsibility of the school boards as local entities which share in the provision of public education. *See Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. The Supreme Court agreed that the school boards were properly named as parties since "the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings." *Id.* In other words, the school boards are not entitled to the benefit of the constitutional right to an education, nor do they alone bear the constitutional responsibility of providing education, but since they have statutory duties to participate as education providers, they remained as parties to the lawsuit. The Supreme Court also noted that the very purpose of the declaratory judgment action was

> by definition, . . . premised on providing parties with a means for courts of record to declare rights, status, and other legal relations" among such parties. In addition, section 1-260 of the General Statutes declares plainly that when declaratory relief is sought, *all persons shall be made parties who have or claim any interest which would be affected by the declaration*. Thus, while the precise party designation -- i.e., plaintiffs -- of the school boards may not have been readily discernible at the time of the trial, the nature of the parties' claims was such that: (1) they sought a declaration of rights, status, and legal relations of and among the parties; and (2) any declaration of the rights, status, and legal relations of and among the parties would affect the role played by the school boards in providing the state's children with the opportunity to obtain a sound basic education.

Id. at 617-18, 599 S.E.2d at 378 (citations, quotation marks, brackets, ellipses, and emphasis omitted) (emphasis added). We have found no mention in *Leandro I* or *II* of adding county boards of commissioners as parties.

The Supreme Court also noted in *Leandro II* the central roles played by the legislative and executive branches in providing public education. *Id.* at 635-38, 599 S.E.2d at 389-91. In affirming the trial court's order directing the State to reassess educational priorities and correct "any and all education-related deficiencies[,]" the Court noted that

> the trial court refused to step in and direct the "nuts and bolts" of the reassessment effort. Acknowledging that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort, the trial court deferred to the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process.
>
> . . . . [W]e note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," *see Leandro*, 346 N.C. at 357, 488 S.E.2d at 261, to correct constitutional deficiencies revealed at trial. In our view, the trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by the evidence and conclusions that were supported by ample and adequate findings of fact.

Id. at 638, 599 S.E.2d at 390-91.

When the *Leandro* cases were decided, North Carolina's laws regarding school district finance were essentially the same as they are now, and Halifax County schools were organized just as they are now. *Leandro II* noted that *Leandro I* carefully distinguished the responsibilities and rights of the "five distinct parties: (1) plaintiff school children (and their respective guardians), (2) plaintiff local school boards, (3) plaintiff-intervenors, (4) the State Board of Education, and (5) the State." *Leandro II*, 358 N.C. at 614, 599 S.E.2d at 376. Although county commissioners levied property taxes and budgeted funds for schools at the time of the *Leandro* cases, just as they do now, the county commissioners for the counties in which the plaintiff local school boards were located were not parties to *Leandro I*, nor were they discussed, at least not initially. *Leandro I*, 346 N.C. at 336, 488 S.E.2d at 249.

In *Leandro II*, the Supreme Court stressed that the duty to provide a sound basic education is the State's duty, but the local entities, including

the school boards, are simply creatures of the State. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. In fact, the trial court had even excluded "the Hoke County School System from responsibility for correcting allocation deficiencies" because the "Local Educational Area" was a "subdivision of the State created solely by the State:"[6]

> Concerning the State's argument that the trial court erred in concluding that the State was liable for its failings in Hoke County schools, we note that the trial court later modified this portion of its order to exclude the Hoke County School System from responsibility for correcting allocation deficiencies, reasoning that since the [Local Educational Area, hereinafter LEA] was a subdivision of the State created solely by the State, it held no authority beyond that accorded it by the State. As a consequence of the LEA's limited authority, the trial court concluded that the State bore ultimate responsibility for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity to students.
>
> In the State's view, any holding that renders the State, and by the State we mean the legislative and executive branches which are constitutionally responsible for public education, accountable for local school board decisions somehow serves to undermine the authority of such school boards. This Court, however, fails to see any such cause and effect. By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local

6. The term "local education agency," or "LEA," was first described in a *Leandro II* trial court order as follows: "In its data collection system, the State of North Carolina uses the term local education agency ('LEA') instead of the more familiar term school district. Accordingly, the Court's reference to school districts will use the term LEA so as to match up with the data." *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, 2000 WL 1639686, at *28 (N.C. Super. Oct. 12, 2000) (unpublished), *aff'd in part as modified*, *rev'd in part*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro* II"). In *Leandro II*, the Supreme Court used the acronym "LEA," but defined it as "Local Educational Area" instead. *Leandro II*, 358 N.C. at 623, 599 S.E.2d at 381. But regardless of how an "LEA" is defined, *Leandro I* and *II* clearly placed the constitutional responsibility to provide a sound basic education on the *State* and not any local entity. *See Leandro II*, 358 N.C. at 635-36, 599 S.E.2d at 389.

> school boards by the State. Thus, the power of the State to create local agencies to administer educational functions is unaffected by the trial court's ruling, and any powers bestowed on such agencies are similarly unaffected. In short, the trial court's ruling simply placed responsibility for the school board's actions on the entity -- the State -- that created the school board and that authorized the school board to act on the State's behalf. In our view, such a conclusion bears no effect whatsoever on the local school board's ability to continue in administering those functions it currently oversees or to be given broader and/or more independent authority. As a consequence, we hold that the State's argument concerning a diminished role for local school boards as a result of the trial court's ruling is without merit.

Id. at 635-36, 599 S.E.2d at 388-89.

The plaintiffs' complaint here seeks to invoke the constitutional rights established by *Leandro I*, but then asks the trial court to assign that constitutional responsibility to the defendant county commissioners alone -- despite the Supreme Court's very specific rulings on the allocation of the constitutional duties from *Leandro I* in *Leandro II*. *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378 ("While it is true that the school boards are not among those endowed with [the constitutional right to a sound basic education] . . ., the school boards were properly maintained as parties because the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings."). Plaintiffs allege:

> Defendant Halifax County Board of Commissioners ("Board" or "Defendant") is constitutionally obligated to structure a system of public education that meets the qualitative mandates established by the North Carolina Supreme Court in *Leandro v. State* ("*Leandro I*") and *Hoke County v. State* ("*Leandro II*"). The Board must provide a system that ensures the opportunity to receive a sound basic education to *every* child in Halifax County. But instead . . . of complying with *Leandro's* mandate, it has chosen to maintain and fund an inefficient three-district system that divides its children along racial lines into "good" and "bad" school districts. By choosing to maintain three racially identifiable and inadequately

> funded school districts to serve this low-income community's declining population of fewer than seven thousand students, the Board violates the constitutional rights of its schoolchildren.

Other allegations of the plaintiff's complaint seem to recognize the State's role -- through the State Board of Education and North Carolina Department of Public Instruction -- in securing the constitutional rights to education in Halifax County, but then seek to assign that obligation, once again, to defendant and solely to defendant, although no case has ever assigned this duty to a board of county commissioners:

> 17. A 2009 consent order between HCPS and the State Board of Education determined that students in HCPS were not being provided the opportunity to receive a sound, basic education and required the North Carolina Department of Public Instruction's [sic] ("DPI") to implement a "turnaround" intervention plan in HCPS.
>
> 18. Because of persistently low student achievement, DPI also implemented a turnaround plan in WCS.
>
> 19. The limited academic improvement in both HCPS and WCS since the implementation of the DPI turnaround plans demonstrates that the Board's education delivery mechanism is an insurmountable impediment to addressing the ongoing violation of Halifax County schoolchildren's constitutional right to the opportunity to receive a sound basic education.

And although the trial court, and this Court, must take the factual allegations of the complaint as true, the courts do not accept allegations of legal conclusions as correct for a motion to dismiss under Rule 12(b)(6).

> [T]he sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. In testing the legal sufficiency of the complaint the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted. In [*Sutton v. Duke*, 277 N.C. 94, 102-03 176 S.E.2d 161, 166 (1970)], the Supreme Court quoted the following passage from 2A Moore's Federal Practice § 12.08 (2d ed. 1968) in stating the rule as to when dismissal is proper: " 'A

> [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' " (Emphasis added).

Boyce v. Boyce, 60 N.C. App. 685, 687, 299 S.E.2d 805, 806-07 (1983) (citations, quotation marks, and emphasis omitted). Many allegations of plaintiffs' complaint are allegations of legal conclusions which purport to be based upon *Leandro I* and *II*. For example, the complaint alleges that "Defendant Halifax County Board of Commissioners ('Board' or 'Defendant') is constitutionally obligated to structure a system of public education that meets the qualitative mandates established by the North Carolina Supreme Court in *Leandro v. State* ('*Leandro I*') and *Hoke County v. State* ('*Leandro II*')[,]" but this is an allegation of a legal conclusion and it is not correct. This allegation of the constitutional responsibilities under the *Leandro* cases is simply not the law, as noted above.

Again, if the 2009 consent order has been violated as the complaint alleges, the court that entered the order should address the violation. At this early pleading stage, the only thing clear from plaintiffs' complaint is that their factual allegations regarding substandard school facilities and poor educational opportunities and outputs are essentially the same ones raised and addressed in *Leandro I*, *Leandro II*, and the *Leandro* court supervision of the provision of public education in Halifax County is still ongoing.

c. The ongoing court supervision in *Leandro* includes Halifax County.

> "*The State must step in with an iron hand and get the mess straight.*" *Hoke Cnty. Bd. of Educ. v. State*, *No. 95 CVS 1158*, *2002 WL 34165636 (N.C. Super. Ct. Apr. 4, 2002) ("Judge Manning 2002 Memorandum").*

Court supervision of education which began in *Leandro I* is still continuing, and the Halifax County Board of Education is a party to that litigation, although the defendant here and the other boards of education in Halifax County are not. Trial court orders after *Leandro I* and *Leandro II* have emphasized the responsibility of the State and soundly rejected arguments that the constitutional responsibility may be shifted to a local entity. For example, in an order issued in 2002 -- just one of many orders issued in that litigation -- Judge Howard E. Manning, Jr. summarized the local and state entities involved in providing education and their statutory and constitutional responsibilities. *See Judge*

Manning 2002 Memorandum, 2002 WL 34165636. Halifax County was one of the counties specifically addressed by this 2002 order. *Id.* While orders issued by lower courts are not binding precedent on this Court, we cannot improve upon Judge Manning's summary of *Leandro I* and his overview of the statutory framework assigning responsibilities in education, so we quote that order at length and with the portions Judge Manning emphasized in all capital letters as it was written:

> [ ] WHO IS RESPONSIBLE FOR SEEING THAT THESE BASIC EDUCATIONAL NEEDS OF ALL CHILDREN ARE MET IN EACH CLASSROOM AND SCHOOL IN NORTH CAROLINA? THE ANSWER IS FOUND IN *LEANDRO*.
>
> Because we conclude that the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with access to a sound basic education, we also conclude that it has inherent power to do those things reasonably related to meeting that constitutionally prescribed duty. *Leandro*, p. 353.
>
> THE STATE OF NORTH CAROLINA IS ULTIMATELY RESPONSIBLE TO ENSURE THAT THE CONSTITUTIONAL GUARANTEE TO EACH CHILD OF THE OPPORTUNITY TO RECEIVE A SOUND BASIC EDUCATION IS MET. THE STATE OF NORTH CAROLINA ALSO HAS THE INHERENT POWER TO DO THOSE THINGS REASONABLY RELATED TO MEETING THAT CONSTITUTIONAL DUTY.
>
> In attempting to meet its constitutional duty to provide each child with the equal opportunity to obtain a sound basic education and to provide a General and Uniform System of schools, the Legislature has enacted legislation creating a system for delivering educational services to children, governance for that system, and has delegated responsibilities to local boards of education. The Legislature has also adopted educational goals and standards that this Court may properly consider in determining whether any children are being denied their right to a sound basic education. *Leandro*, p. 355.
>
> Chapter 115C of the North Carolina General Statutes is home to many educational goals and polices, as well as the structure of the general and uniform system of schools. The Court has previously discussed newly enacted and recent legislation. Additional, pertinent sections of

> Chapter 115C follow and provide additional, clear and convincing evidence that the State of North Carolina is in fact, and in law, ultimately responsible for providing every child with the equal opportunity to obtain a sound basic education and that the educational goals adopted as policy closely align with the constitutional definition of a sound basic education[.]

Id.

Judge Manning then listed various statutes setting forth the State's policies on education and the duties of the various entities in providing education, including the following, with headings from the order in capital letters:

> N.C.G.S. 115C-1. General and uniform system of schools.
>
> STATE BOARD OF EDUCATION, N.C.G.S. 115C-12. Powers and duties of the Board generally.
>
> LOCAL BOARDS OF EDUCATION
> 115C-35, et seq.
> 115-36. Designation of board.
> 115C-47. Powers and duties generally.
>
> GENERAL EDUCATION
> 115C-81. Basic Education Program.
> 115C-81.2. Comprehensive plan for reading achievement.
> 115C-105.20. School-Based Management and Accountability Program.
>
> N.C.G.S. 115C-105.21. Local participation in the Program.
>
> N.C.G.S. 115C-105.27. Development and approval of school improvement plans.
>
> N.C.G.S. 115C-105.37. Identification of low-performing schools.
> N.C.G.S. 115C-105.37A. Continually low-performing schools; definition; assistance and intervention; reassignment of students.
> N.C.G.S. 115C-105.38. Assistance teams; review by State Board.
> N.C.G.S. 115C-105.38A. Teacher competency assurance.
> N.C.G.S. 115C-105.39. Dismissal or removal of personnel; appointment of interim superintendent.

> N.C.G.S. 115C-105.40. Student academic performance standards.
>
> SAFE SCHOOLS - MAINTAINING SAFE & ORDERLY SCHOOLS. Article 8C.
> N.C.G.S. 115C-105.45. Legislative findings.
>
> ACADEMICALLY OR INTELLECTUALLY GIFTED STUDENTS. Article 9B.
> 115C-150.5. Academically or intellectually gifted students.
>
> FUNDS FOR ACADEMICALLY GIFTED STUDENTS. Budget Section 28.3
>
> FINANCIAL POLICY OF THE STATE OF NORTH CAROLINA AS IT RELATES TO THE PUBLIC SCHOOL SYSTEM.
> N.C.G.S. 115C-408. Funds under the control of the State Board of Education.

Id.

Judge Manning then summarized the responsibilities set forth in the above statutes:

> Under Chapter 115C's statutory scheme, the responsibility for administering and operating a general and uniform system of public schools is delegated to the State Board of Education, and the local boards of education (LEAs). Thus, by law, each LEA is statutorily responsible for providing the children within the district with the constitutionally mandated opportunity to receive the sound basic education.
>
> Under the Constitution, however, the obligation to provide each child with the equal opportunity to obtain a sound basic education may not be abdicated by the State of North Carolina nor may the ultimate responsibility be transferred to and placed on the LEAs.
>
> The State acknowledges that it may not abdicate its obligation to assure that every child has the opportunity to a sound basic education in its brief. "But, while emphasizing local control, the General Assembly, the State Board of Education and the Department of Public Instruction are not abdicating their constitutional responsibility to provide every student with the opportunity to acquire a sound basic education."

> It is, therefore, undisputed that the constitutional responsibility to provide each child with the equal opportunity to obtain a sound basic education remains with the State of North Carolina acting through its General Assembly. *Leandro*, p 353.

Id. (record citations and italic emphasis omitted).

Judge Manning completely rejected the State's arguments which sought to place the responsibilities upon local entities and described the State's responsibilities in no uncertain terms:

> The bottom line is that the State of North Carolina has consistently tried to avoid responsibility for the failures to provide at-risk students with the equal opportunity for a sound basic education in LEAs throughout the state by blaming the failures on lack of leadership and effort by the individual LEAs.
>
> The Supreme Court in *Leandro* clearly and unmistakably held to the contrary and found that the North Carolina Constitution provides every child with the right to receive an equal opportunity to a sound basic education and that it was the General Assembly, under Article IX, Section 2(1) that "has the duty of providing the children of every school district with access to a sound basic education." (*Leandro* p. 353)
>
> This Court, following *Leandro's* mandate, has rejected the State of North Carolina's flawed argument that "it" is not responsible for educational failures in LEAs that are not providing their at-risk children with the equal opportunity to receive a sound basic education and has determined, just like the Supreme Court did on July 24, 1997, that the State is ultimately responsible and cannot abdicate its responsibility to the LEA.
>
> That having been said, the State's denial of responsibility fails as a matter of law. It is now, and always has been, the ultimate responsibility of the State to provide the equal opportunity to a sound basic education to all children. (Article I, Section 15; Article IX, Section 2(1), North Carolina Constitution)
>
> **This Court has, in accordance with *Leandro*, Ordered the State, not the LEAs, to fix the deficiencies that**

exist with at-risk children. This is so because the LEAs, like the counties themselves, are mere subdivisions of the State. The LEAs were created by the State for its own convenience in order to assist the State in performing its constitutional duty to provide each and every child with the equal opportunity to obtain a sound basic education through its free public school system. It is up to the Executive and Legislative Branches to provide the solution to the constitutional deficits with at-risk children. These branches can no longer stand back and point their fingers at individual LEAs, such as HCSS, and escape responsibility for lack of leadership and effort, lack of effective implementation of educational strategies, the lack of competent, certified, well-trained teachers effectively teaching children, or the lack of effective management of the resources that the State is providing to each LEA.

The State of North Carolina must roll up its sleeves, step in, and utilizing its constitutional authority and power over the LEAs, cause effective educational change when and where required. It does not matter whether the lack of an equal opportunity to obtain a sound basic education is caused by teachers, principals, lack of instructional materials or other resources, or a lack of leadership and effort.

The State must step in with an iron hand and get the mess straight. If it takes removing an ineffective Superintendent, Principal, teacher, or group of teachers and putting effective, competent ones in their place, so be it. If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place.

The State of North Carolina cannot shirk or delegate its ultimate responsibility to provide each and every child in the State with the equal opportunity to obtain a sound basic education, even if it requires the State to spend additional monies to do so.

The State of North Carolina has steadfastly represented to this Court and to the citizens of North Carolina that the State is "continuing to appropriate additional funds and

> initiate new programs to assure that students enrolled in North Carolina public schools are receiving the opportunity to acquire a sound basic education."
>
> In the final analysis, if the State is true to its word about providing sufficient appropriate funding for each child to have the equal opportunity to obtain a sound basic education, the State should be able to correct the educational deficiencies which are denying at-risk children the equal opportunity to obtain a sound basic education by requiring LEAs that are not getting the job done to implement and maintain cost-effective, successful educational programs in their schools as required by *Leandro*. If not, then the State will have to look for other resources to get the job done.
>
> Make no mistake. While the State can require the LEAs to take corrective action, it remains the State's responsibility, through forceful leadership and effective management, to show an ineffective LEA, or an ineffective school within an LEA: (1) how to get the job done if the LEA's leadership and educational staff is ineffective and inept; (2) how to cost-effectively manage the resources which the State contends it so adequately provides to support each child's equal opportunity to receive a sound basic education; and (3) how to implement effective educational programs, using competent, well-trained certified teachers and principals.

Id. (Italics omitted; bold added).

Although plaintiffs are understandably not satisfied with the results produced by the orders in *Leandro I* and *II*, this Court cannot create a new constitutional right or a new claim where the Supreme Court has addressed the right in detail and the subject of this lawsuit is already under court oversight in another case.

d. Defendant acting alone does not have the power to merge school districts, but the State does.

"By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local school boards by the State." Leandro II, 358 N.C. at 635, 599 S.E.2d at 389.

Plaintiffs necessarily rely upon *Leandro I* and *Leandro II* for the constitutional basis for their claim, but they also seek to distinguish this case from the *Leandro* cases by focusing on the taxing authority of the counties, the allocation of local tax revenues, and the existence of three school districts within Halifax County. Certainly, local tax revenues are an important factor in education, but that does not change our Supreme Court's rulings in *Leandro I* and *Leandro II*. North Carolina's system of taxation and school finance was essentially the same when *Leandro* was decided as it is now. In addition, financing of public schools is a complex system which extends from the federal government all the way down to the local school district, so we attempt only a brief and oversimplified overview of that system.

The constitutional duty to provide a sound basic education rests upon the State, as directed by *Leandro I*, 346 N.C. at 353, 488 S.E.2d at 258, and *Leandro II*, 358 N.C. at 614-15, 635, 599 S.E.2d at 376, 389; obviously funding is an essential part of that responsibility. The State carries out this duty through the budget adopted by the General Assembly and administered through the State Board of Education and Department of Public Instruction. At the local level, the responsibility to provide public education is vested in the local boards of education.[7] The county commissioners have taxing authority and along with the Boards of Education, they establish the local county budget for the schools. *See, e.g.*, N.C. Gen. Stat. § 115C-429 (2015) ("Approval of budget; submission to county commissioners; commissioners' action on budget"). If a board of education believes the funds appropriated by a county to be inadequate, the remedy is in N.C. Gen. Stat. § 115C-431 (2015) ("Procedure for resolution of dispute between board of education and board of county commissioners"), which sets forth the exclusive process for mediation and litigation, if necessary. If the mediation fails, ultimately a jury may determine the proper budget for the schools. *Id.* Of course, federal funding and regulation also play important roles in public education. But regardless of the taxing authority of the county, the *Leandro* cases have answered the question of who bears the constitutional responsibility and have addressed issues of school funding at great length.

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7. "[N.C. Gen. Stat.] § 115C-47. Powers and duties generally. In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty: (1) To Provide the Opportunity to Receive a Sound Basic Education.–It shall be the duty of local boards of education to provide students with the opportunity to receive a sound basic education and to make all policy decisions with that objective in mind, including employment decisions, budget development, and other administrative actions, within their respective local school administrative units, as directed by law." N.C. Gen. Stat. § 115C-47(1) (2015).

Plaintiffs also stress the existence of three school districts within Halifax County: Halifax County Schools, Weldon City Schools, and Roanoke Rapids Schools. Plaintiffs allege that "Defendant's continued maintenance of three inadequately and inefficiently resourced and racially identifiable school districts prevents students in Halifax County from obtaining the opportunity to receive a sound basic education." In the Request for Relief, plaintiffs ask:

> 1. That the Court find and conclude that Defendant's maintenance of three separate school districts obstructs Halifax County's students from securing the opportunity to receive a sound basic education;
>
> 2. That the Court find and conclude that Defendant's maintenance of three separate school districts denies at-risk students in Halifax County the opportunity to receive a sound basic education;
>
> 3. That the Court exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education.

As a practical matter, plaintiffs are asking this Court to require that the three school systems be merged, and we must take as true plaintiffs' allegations that having a single school district in Halifax County would allow a more equitable allocation of tax revenues and a better school administration. But the relief requested in Request 3 as quoted above is essentially what the court is already doing in the ongoing *Leandro I* and *Leandro II* litigation. Beyond that, even if merger of the local administration units in Halifax County would ameliorate the problems noted by plaintiffs, this defendant does not, on its own, have the authority to provide that relief. Under N.C. Gen. Stat. § 115C-67 (2015):

> City school administrative units may be consolidated and merged with contiguous city school administrative units and with county school administrative units upon approval by the State Board of Education of a plan for consolidation and merger submitted by the boards of education involved and bearing the approval of the board of county commissioners.

> County and city boards of education desiring to consolidate and merge their school administrative units may do so by entering into a written plan which shall set forth the conditions of merger. . . .
>
> The plan referred to above shall be mutually agreed upon by the city and county boards of education involved and shall be accompanied by a certification that the plan was approved by the board of education on a given day and that the action has been duly recorded in the minutes of said board, together with a certification to the effect that the public hearing required above was announced and held. The plan, together with the required certifications, shall then be submitted to the board of county commissioners for its concurrence and approval. After such approval has been received, the plan shall be submitted to the State Board of Education for the approval of said State Board and the plan shall not become effective until such approval is granted. Upon approval by the State Board of Education, the plan of consolidation and merger shall become final and shall be deemed to have been made by authority of law and shall not be changed or amended except by an act of the General Assembly. The written plan of agreement shall be placed in the custody of the board of education operating and administering the public schools in the merged unit and a copy filed with the Secretary of State.

Boards of Education can be merged in other ways. For example, a "city board of education" may dissolve itself:

> If a city board of education notifies the State Board of Education that it is dissolving itself, the State Board of Education shall adopt a plan of consolidation and merger of that city school administrative unit with the county school administrative unit in the county in which the city unit is located; provided, however, if a city school administrative unit located in more than one county notifies the State Board of Education that it is dissolving itself, the State Board shall adopt a plan that divides the city unit along the county line and consolidates and merges the part of the city unit in each county with the county unit in that county and the plans shall take effect on the same day. The plans shall be prepared and approved in

> accordance with G.S. 115C-67 as provided by general law, and G.S. 115C-68 as provided by general law, as applicable, except that the county and city boards of education and the boards of commissioners shall not participate by preparing, entering into, submitting, or agreeing to a plan, and the plan shall not be contingent upon approval by the voters.

N.C. Gen. Stat. Ann. § 115C-68.2 (2015).

In other words, the General Assembly has adopted a comprehensive set of statutes addressing the organization and merger of school districts, and the State retains the power to control the school districts and counties. Plaintiffs argue that only the county commissioners can *initiate* a merger plan for the school districts, but they acknowledge in their reply brief that such a plan must still be approved by the State and cannot be accomplished by the county commissioners alone. Plaintiffs here ask this Court to overlook the complex statutory framework governing educational administration and finance and to take on the role of the legislature in correcting the deficiencies in Halifax County by ordering the consolidation of the three school districts. In addition, plaintiffs ask the Court to order defendants to make this merger happen *without* the participation as parties of all three Boards of Education in Halifax County and the entities comprising "the State" vested with the constitutional and statutory responsibilities to provide education. Under *Leandro I* and *II*, this Court does not have that authority, and this defendant -- the Halifax County Board of Commissioners -- does not have that constitutional duty described in *Leandro I* or even the ability *on its own* to do what the plaintiffs ask. Although the Board of Commissioners surely has statutory duties related to education, still the State and all of the school boards within Halifax County would be necessary parties to any lawsuit seeking consolidation of the school boards.

e. Counties are creatures of the State.

> "*[C]ounties are merely instrumentalities and agencies of the State government." Martin Cnty. v. Wachovia Bank & Trust Co.*, 178 N.C. 26, 31-32, 100 S.E. 134, 137 (1919).

Leandro II stressed that the constitutional duty is upon the State and not the school boards, which are creatures of the State. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. Counties do not differ from local school boards in this regard. Counties are also creatures of and instrumentalities of the State, with specific statutorily-assigned roles, but ultimately created by and controlled by the State:

> Counties are creatures of the General Assembly and serve as agents and instrumentalities of State government. Counties are subject to almost unlimited legislative control, except to the extent set out in the State Constitution. The powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy.
>
> Counties serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens.

Stephenson v. Bartlett, 355 N.C. 354, 364-65, 562 S.E.2d 377, 385 (2002) (citations, quotation marks, and brackets omitted).

> This Court clearly has stated that: In the exercise of ordinary governmental functions, counties are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control except where this power is restricted by constitutional provision. As such, a county's powers[,] both express and implied, are conferred by statutes, enacted from time to time by the General Assembly. A county is not, in a strict legal sense, a municipal corporation, as a city or town. It is rather an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits.

Lanvale Props., LLC v. Cnty. of Cabarrus, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (citations, quotation marks, brackets, and ellipses omitted).

The North Carolina Constitution does not limit the State in its control over local educational matters, including county taxation or school district organization, in any manner which would allow the State to abdicate its duties under *Leandro I* and *II* to provide a sound basic education or to give the defendant here a constitutional duty to provide a sound basic education. The General Assembly can create counties, change their boundaries, and prescribe their duties:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental

> subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1.

Our Supreme Court has long recognized the plenary power of the General Assembly over counties and over the creation and organization of school districts:

> In [a previous] case the Legislature had authorized the establishment of a graded school in two public school districts of Robeson County, subject to the will of the people to be ascertained in an election to be held. The board of commissioners undertook by order to include additional territory within the district. Denying this authority to be in the board of county commissioners, and speaking to the question, the Court said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them when they apply.
>
> "It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the Legislature may, from time to time, in its

> discretion, abolish them, enlarge or diminish their boundaries, or increase, modify or abrogate their powers[."]
>
> "Whenever such agencies are created, whatever their purpose or the extent or character of their powers, they are the creatures of the legislative will and subject to its control, and such agencies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law[.]"
>
> "[The Boards of County Commissioners] powers as the county board of education are derived from public school laws[.]"
>
> The decisions of this Court through the years since have been uniform in holding that the mandate of Art. IX of the Constitution of North Carolina for the establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. Laws passed in obedience to such mandate have been repeatedly approved and upheld by the decisions of this Court.

Moore v. Bd. of Educ. of Iredell Cnty., 212 N.C. 499, 501-02, 193 S.E. 723, 733-34 (1937) (citations omitted).

This Court has recognized the extent of the power the General Assembly has over counties: "The power to create, abolish, enlarge or diminish the boundaries of a county is vested exclusively in the legislature." *Rowe v. Walker*, 114 N.C. App. 36, 41, 441 S.E.2d 156, 159 (1994), *aff'd per curiam*, 340 N.C. 107, 455 S.E.2d 160 (1995). There are some constitutional prohibitions which prevent certain actions by the State regarding counties, but there is no constitutional prohibition on the State's power that would change the responsibility of the county commissioners in any manner relevant to this case.

> Speaking of the counties of this State, this Court has said . . . [t]hese counties are not, strictly speaking, municipal corporations at all, in the ordinary acceptance of that term. They have many of the features of such corporations, but they are usually termed *quasi*-public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory; and, in the exercise of such functions, they are subject to almost unlimited legislative control, except

> when the power is restricted by constitutional provisions. . . . The weight of authority is to the effect that all the powers and functions of a county bear reference to the general policy of the state, and are in fact an integral portion of the general administration of state policy.

Martin v. Bd. of Comm'rs of Wake Cnty., 208 N.C. 354, 365, 180 S.E. 777, 783 (1935) (citations and quotation marks omitted).

The State has created, abolished, merged, and changed the boundaries of counties many times throughout North Carolina's history. *See generally* David Leroy Corbitt, The Formation of the North Carolina Counties 1663-1943, State Department of Archives and History (1950). In fact, the General Assembly created Halifax County in 1758 from a portion of Edgecombe County. *See Martin Cty. v. Wachovia Bank & Trust Co.*, 178 N.C. 26, 31-32, 100 S.E. 134, 137 (1919), ("[T]he boundary of Martin County is the low-water mark on the south side of the river. This appears from ch. 4, Laws 1729; 25 St. Records, 212; 2 Rev. Stat. 164; which boundary is recognized by the subsequent acts creating Edgecombe County out of Tyrrell, Laws 1741, ch. 7; 23 St. Records, 164; 2 Rev. Stat. 124; the act creating Halifax [C]ounty out of the territory of Edgecombe, Laws 1758, ch. 13; 23 St. Records, 496; 2 Rev. Stat. 133; and, finally, the act creating Martin County out of Halifax and Tyrrell, Laws 1774, ch. 32; 25 St. Records, 976; 2 Rev. Stat. 145. Indeed, it has been the usual procedure by the act establishing new counties that where a river or other stream is the dividing line said river has remained within the limits of the county from which the new county has been taken. But counties are merely instrumentalities and agencies of the State government.").

The General Assembly has in the past adopted legislation to accomplish the merger of school districts within a county. At oral argument, plaintiffs noted the constitutional limitations of N.C. Const. Art. II, § 24(1)(h) on local legislation "changing the lines of school districts[,]" but our courts have held that the type of legislation which could address the merger of school systems in Halifax County is not unconstitutional. For example, in *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 508, 430 S.E.2d 681, 683 (1993), the Guilford County Board of Education sought a declaratory judgment that a law entitled "An Act to Consolidate All of the School Administrative Units in Guilford County or to Provide for the Two City School Administrative Units in that County to have Boundaries Coterminous With the Cities, Subject to a Referendum" was unconstitutional as a local act. The Act in question was adopted to address the same types of problems with education opportunities as alleged by plaintiffs here:

> The Act recited that it was promulgated in order to better pursue the Guilford County school administrative units' common goals of excellence and equity in educational opportunity for all children "regardless of where the children reside or attend school within Guilford County, in order that the needs of all children attending school in Guilford County are met, regardless of the children's race, gender, or social or economic condition."

Id.

This Court found the law to be constitutional and not a "local act" even though it dealt only with Guilford County:

> The simple fact that the Act affects only Guilford County, rather than all of the counties in North Carolina, does not compel the conclusion that it is a local act. The number of counties excluded or included is not necessarily determinative, and a statute may be general even if it includes only one county. For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition. We agree with the trial court that the Act meets the definition of a general law under both the *Adams* and the *Emerald Isle* tests. The students in Guilford County are a class which reasonably warrants special legislative attention and the provisions of the Act apply uniformly to all of the students. In deciding to consolidate the school administrative units of Guilford County, the Legislature made a rational distinction reasonably related to the Act's purpose to pursue the goals of excellence and equity in educational opportunity for all children of Guilford County. Merely because other counties in the State may have similar goals or needs does not preclude the General Assembly from passing legislation designed to address the needs of all students in a single county. Thus, we hold that the Act withstands the reasonable classification analysis.
>
> Application of the general public welfare analysis which the Supreme Court recognized in *Emerald Isle* also leads to the conclusion that the Act is a constitutional general law. Legislation which promotes equitable access to educational opportunity among all children attending

> public schools even in a single county is rationally related to the overall purpose of excellence and equity in our school system, which in turn promotes the general welfare of all citizens. Our Constitution specifically provides that religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

Id. at 513-14, 430 S.E.2d at 686-87 (citations, quotation marks, and brackets omitted).

The State may, by legislation, allow school districts or local governments authority to merge or change school districts, but the General Assembly still retains the power to change or revoke that authority. S*ee*, *e.g.*, *Kings Mountain Bd. of Educ. v. N. Carolina State Bd. of Educ.*, 159 N.C. App. 568, 572, 583 S.E.2d 629, 633 (2003) ("The ability to create the boundaries of a school district is vested solely within the power of the legislature, however. Thus, a municipality may not expand its school district boundaries without an express or implied delegation of legislative authority." (Citations omitted)). Indeed, consistent with Article IX, Section 2(2), the General Assembly has, by statute, assigned to units of local government the financial responsibility for many aspects of the free public schools. Our General Assembly has assigned to local governments, such as the Board, responsibility for: (1) "facilities requirements" for "a public education system," N.C. Gen. Stat. § 115C-408(b) (2015); (2) "the cost[s] of . . . buildings, equipment, and apparatus" that the "boards of commissioners . . . find to be necessary[,]" N.C. Gen. Stat. § 115C-521(b) (2015); (3) school buses and service vehicles, N.C. Gen. Stat. § 115C-249(a)-(b) (2015); (4) suitable supplies for the school buildings, including "instructional supplies, proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences," N.C. Gen. Stat. § 115C-522(c) (2015); and (5) providing "every school with a good supply of water," N.C. Gen. Stat. § 115C-522(c) (2015). Local boards of county commissioners are also responsible for "keep[ing] all school buildings in good repair," and ensuring that school buildings are "at all times in proper condition for use." N.C. Gen. Stat. § 115C-524(b) (2015).[8]

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8. Some of the statutes listed above dictate that the financial responsibilities are to be shared between the "local boards of education" and the "tax-levying authorities." *See*, *e.g.*, N.C. Gen. Stat. § 115C-522(c); N.C. Gen. Stat. § 115C-524(b). The definition of "tax-levying authority" provided in the General Statutes includes, as relevant here, "the board of county commissioners of the county or counties in which an administrative unit is located[.]" N.C. Gen. Stat. § 115C-5(10) (2015).

The General Assembly created Halifax County and granted it any powers it may have; and the General Assembly retains its power to carry out its constitutional obligations under *Leandro I* and *II* to provide a sound basic education in Halifax County, regardless of the current arrangement of the school districts. In conclusion, *Leandro I* has answered the question of the State's constitutional obligation to provide a sound basic education, and defendant on its own simply does not have the power or authority to do what plaintiffs ask. Accordingly, the trial court's order granting defendant's motion to dismiss is affirmed.

IV. Conclusion

For the foregoing reasons, the trial court's order granting defendant's motion to dismiss is affirmed.

AFFIRMED.

Judge INMAN concurs.

Chief Judge McGEE dissents with separate opinion.

McGEE, Chief Judge, dissenting.

This case requires us to decide whether a board of county commissioners has a constitutional duty to provide for a sound basic public education, consistent with *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*") and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"), when aspects of the funding of public education have been statutorily assigned to those boards, consistent with Article IX, Section 2(2) of the North Carolina Constitution. The case arrives at this Court at a very early stage of the proceedings; the trial court granted defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Accepting plaintiff's factual allegations as true for the purposes of this appeal – as we must, *see Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) – and for the reasons that follow, I conclude that plaintiffs have stated a claim against defendant, and that a board of county commissioners is a proper defendant in a lawsuit seeking to assert a schoolchild's right to a sound basic public education under the North Carolina Constitution, when the inability to receive such an education is alleged to have resulted from actions or inactions of the board. This conclusion is not foreclosed by *Leandro I* or *Leandro II*, neither of

which decided the question we confront in this case. I respectfully dissent from the majority's contrary holding.

I.

Plaintiffs argue that their complaint, taken as true, states a claim against defendant for a violation of the rights conferred by Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and the Board's choices "deprived plaintiffs of their constitutionally-guaranteed opportunity to receive a sound basic education." "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Mason v. Dwinnell*, 190 N.C. App. 209, 217, 600 S.E.2d 58, 63 (2008) (citation omitted). The majority aptly describes the facts and holdings of our Supreme Court in *Leandro I* and *Leandro II*, which need not be repeated at length. While the Supreme Court's interpretation of Article I, Section 15 and Article IX, Section 2 in *Leandro I*, and its analysis of what evidence is sufficient to prove a violation of the right to a sound basic education in *Leandro II*, provide guidance to this Court, neither of those decisions answers the precise question posited in this case – whether a local board of county commissioners may be held responsible for providing a sound basic public education for the students within their county. That question was not at issue in *Leandro I* nor *Leandro II*. *See Leandro I*, 356 N.C. at 341-42, 488 S.E.2d at 251; *Leandro II*, 358 N.C. at 609-10, 599 S.E.2d at 373-74. After examining the constitutional text, the applicable General Statutes, and our Supreme Court's precedent on the matter, I would hold that plaintiffs have asserted allegations in their complaint that, if true, state a claim upon which relief may be granted against defendant.

I begin with the fundamental principle, established by our Supreme Court in *Leandro I*, that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution "combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255. This right is enforceable against the State and the State Board of Education, as our Supreme Court held in *Leandro I* and *Leandro II*. *See* N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); N.C. Const. art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools"); *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 255. The enforceability of the right, however, does not end there. Under Article IX, Section 2(2), boards of county commissioners have a role to play, if the General Assembly so instructs, as they may be assigned part of the responsibility for financial support

of the public schools: "The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate." N.C. CONST. art. IX §2(2); *see also Leandro I*, 346 N.C. at 349, 488 S.E.2d at 256 ("Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools.").

Consistent with Article IX, Section 2(2), the General Assembly has, by statute, assigned to units of local government the financial responsibility for many aspects of the free public schools. The General Assembly has assigned to boards of county commissioners, such as the Board in this case, responsibility for, *inter alia*: (1) "facilities requirements" for "a public education system," N.C. Gen. Stat. § 115C-408(b) (2015); (2) "the costs of . . . buildings, equipment, and apparatus" that the "boards of commissioners . . . find to be necessary," N.C. Gen. Stat. § 115C-521(b) (2015); (3) school buses and service vehicles, N.C. Gen. Stat. § 115C-249(a)-(b) (2015); (4) suitable supplies for the school buildings, including "instructional supplies, proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences," N.C. Gen. Stat. § 115C-522(c) (2015); and (5) providing "every school with a good supply of water," N.C. Gen. Stat. § 115C-522(c) (2015). Local boards of county commissioners are also responsible for "keep[ing] all school buildings in good repair," and ensuring that school buildings are "at all times in proper condition for use." N.C. Gen. Stat. § 115C-524(b) (2015).[1]

Article I, Section 15 and Article IX, Section 2 "combine" to impose on the State the responsibility to provide for a sound basic education for the children of North Carolina. *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255. Also, pursuant to the explicit terms of Article IX, Section 2(2), the State may assign to local boards of county commissioners – in the Constitution's language, the "units of local government" –financial responsibility for public schools. N.C. CONST. art. IX, §2(2). Given this right, established in *Leandro I*, and this assignment authority provided by the Constitution, I would hold that the guarantee of a sound basic education follows the assignment of financial responsibility, if made by

1. Some of the statutes listed above dictate that the financial responsibilities are to be shared between the "local boards of education" and the "tax-levying authorities." *See, e.g.*, N.C. Gen. Stat. § 115C-522(c); N.C. Gen. Stat. § 115C-524(b). The definition of "tax-levying authority" provided in the General Statutes includes, as relevant here, "the board of county commissioners of the county or counties in which an administrative unit is located[.]" N.C. Gen. Stat. § 115C-5(10) (2015).

the General Assembly. When the General Assembly assigns to boards of county commissioners the financial responsibility for aspects of public education, such as adequate facilities, equipment, water supplies, and learning materials, North Carolina schoolchildren must be able to pursue a declaratory action against those boards to assert that it has failed to adequately fund the aspects of public schooling assigned to it, and that such a failure has resulted in the lack of "an opportunity to receive a sound basic education in our public schools." *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255.

With these principles in mind, I consider plaintiffs' complaint in the present case. In their complaint, plaintiffs allege that Halifax County Schools and Weldon City Schools lack the necessary resources to provide fundamental educational opportunities to the children in their school districts. Plaintiffs further complain of inadequate school facilities, crumbling ceilings, leaking pipes, sewage in the hallways, and a lack of adequate instructional materials in the majority-minority districts. These deficiencies, plaintiffs allege, are a direct result of defendant's funding choices, and have led to poor test scores by the schoolchildren and the inability to retain qualified teachers. Plaintiffs requested, in their complaint, that the court "exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education." I would hold that, to the extent plaintiffs' complaint asserts that the children's inability to receive a sound basic public education is a result of the Board's inadequate funding of buildings, supplies, and other resources, responsibility for which was assigned to it by the General Assembly pursuant to Article IX, Section 2(2) of the North Carolina Constitution, plaintiffs have stated a claim upon which relief may be granted to assert their constitutional rights to a sound basic public education.

II.

The majority makes a variety of thoughtful arguments as to why plaintiffs' claims are foreclosed by our Supreme Court's holdings in *Leandro I* and *Leandro II*. I disagree, and briefly address those arguments. The majority opinion first asserts that the *Leandro* cases "began as a declaratory judgment action with the express purpose of determining the extent of the state constitutional right to a sound basic education and the entities responsible for providing that education," and that "*Leandro I* and *Leandro II* determined the correct parties and the entities legally responsible for providing a sound basic education under the

North Carolina Constitution." (emphasis in original) (citing *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374). However, the Court in *Leandro II* did not decide such a sweeping question; as explained by the Court, the *Leandro* cases were

> initiated as a declaratory judgment action . . . [, and] commenced in 1994 when select students from Cumberland, Halifax, Hoke, Robeson, and Vance Counties, their respective guardians ad litem, and the corresponding local boards of education, denominated as plaintiffs, sought declaratory and other relief for alleged violations of the educational provisions of the North Carolina Constitution and the North Carolina General Statutes.

Leandro II, 358 N.C. at 611, 599 S.E.2d at 374. Our Supreme Court never stated that it was determining the entire or exclusive group of entities responsible for providing a sound basic education. Rather, the Court determined the discrete legal question presented to it: whether the plaintiffs in that case "[had] a right to adequate educational opportunities which [was] being denied them by defendants[, the State of North Carolina and the State Board of Education,] under the current school funding system." *Leandro I*, 346 N.C. at 341, 488 S.E.2d at 252. *Leandro I* and *Leandro II* do not address whether other entities may be responsible under our Constitution for a sound basic public education.

It is not surprising that the *Leandro* Courts did not address whether boards of county commissioners had any responsibility for a sound basic education under our Constitution, nor is it surprising that those Courts did not hold that a board of county commissioners may be held responsible if a student's inability to obtain a sound basic education is due to the board's funding decisions. No board of county commissioners was a party to that litigation, and the Court was not asked to determine whether a board of county commissioners had that responsibility. That question remains unanswered by our Courts.

The majority opinion holds that all of the deficiencies alleged in plaintiffs' complaint, including poor educational performance, inadequate buildings, and lack of school supplies at the three school systems located within Halifax County, have already been addressed within the context of *Leandro I* and *Leandro II*, and that "if the 2009 consent order" that was entered by the superior court on remand from our Supreme Court's decision in *Leandro I* "has been violated, the court which entered that order should address the violation." However, as the majority opinion notes, the Board was not a party to the *Leandro*

litigation. Therefore, the 2009 consent order – along with all of the ongoing supervision in that case – does not, and cannot, bind the Board or force it to act. While the Halifax County Board of Education was a party to the Leandro litigation, it was a plaintiff, not a defendant.

The majority suggests a path forward for plaintiffs, writing that "rather than filing this separate lawsuit, the correct avenue for addressing plaintiffs' concerns in the present case *would appear to be* through the ongoing litigation in *Leandro I* and *Leandro II*." (emphasis added).[2] But the *Leandro* cases' sole focus was on the funding provided by the State, *not* the local revenues collected and disbursed by boards of county commissioners, including the Board in the present case. It is *these* revenues that plaintiffs allege the Board is failing to disburse to the three school systems in Halifax County consistent with the constitutional right to a public education in the schools in this State. I do not see how plaintiffs, who were not parties in *Leandro*, could assert a claim in the ongoing *Leandro* litigation against defendant, also not a party in *Leandro*, seeking a larger portion of local revenues, which were not at issue in *Leandro*.

The plain language of Article IX, Section 2(2) clearly recognizes "local responsibility" in public education, and provides that if the General Assembly assigns to "units of local government such responsibility for the financial support of the free public schools," those units of local government may use "local revenues to add to or supplement any public school[.]" N.C. CONST. ART. IX §2(2). The drafters of the Constitution contemplated that local revenues, which do not originate from the State, could be used to fund aspects of public education. As explained above, at this early stage in the proceedings plaintiffs have sufficiently alleged that the local boards of county commissioners must disburse these local revenues in a way that does not violate the constitutional right to a sound basic education established by our Supreme Court in *Leandro I*, and must be able to be held accountable for their failure to do so.

III.

The majority opinion states that, "[a]s a practical matter, plaintiffs are asking this Court to require that the three school systems [in Halifax County] be merged, and notes that defendant "does not, on

2. Note that the majority does not definitively determine that plaintiffs may obtain relief through the suggested avenue. Just as the obligations of county commissioners was not at issue in *Leandro I* or *Leandro II*, whether plaintiffs may assert some sort of claim in the ongoing *Leandro* court supervision is not an issue presented for adjudication in the present case.

its own, have the authority to provide that relief." *See generally* Section III(d), *supra*. I concur in that assessment, as I too, believe that plaintiffs have requested something – the merging of the three school systems geographically located in Halifax County – that defendant and this Court have no authority to provide. However, plaintiffs also requested that the court "exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations . . . to ensure that every student in Halifax County is provided the opportunity to receive a sound basic public education," and have also requested "such other and further relief as the [c]ourt may deem just and proper."

This prayer for relief is broad and if, on remand, the trial court were to make findings and conclusions from competent evidence that the Board had violated a student's right to a sound basic education, the trial court would be able, as our Supreme Court held in *Leandro I* after declaring a right to a sound basic education, to "enter[] a judgment granting declaratory relief and such other relief as needed to correct" the constitutional violation. *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 (citation omitted).[3] The trial court would be entrusted with the duty to fashion an appropriate remedy which "minimiz[ed] the encroachment upon the other branches of government," including the Board and the General Assembly. *Id.* (citation omitted).

IV.

I respectfully dissent from the majority opinion's conclusion that the Board is not constitutionally responsible for public education, not even for those aspects of public education the General Assembly has seen fit to statutorily assign financial responsibility for, consistent with Article IX, Section 2(2) of the North Carolina Constitution. I would hold that plaintiffs have stated a claim upon which relief may be granted, to the extent that their complaint alleges that the schoolchildren are unable to receive a sound basic public education, and that inability is a result of the Board's inadequate funding of buildings, supplies, and other resources, responsibility for which was assigned to the Board by the General Assembly consistent with Article IX, Section 2(2) of the North Carolina Constitution. I would therefore reverse the trial court's order granting defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), and remand for further proceedings. I respectfully dissent.

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3. It is important to note that this discussion is not focused on the *right* to a sound basic education – and whether such a right may be enforceable against the Board – but rather on what *remedy* may be available once a violation of that right is established.

SOLESBEE v. BROWN

[255 N.C. App. 603 (2017)]

JANET H. SOLESBEE AND HUSBAND CARL SOLESBEE, PETITIONERS
v.
CHERYL H. BROWN AND HUSBAND ROGER BROWN, GWENDA H. ANGEL AND HUSBAND WESLEY ANGEL, AND LISA H. DEBRUHL AND HUSBAND J. DELAINE DEBRUHL, RESPONDENTS

No. COA16-1214

Filed 19 September 2017

1. Real Property—partition by sale—actual partition—substantial injury—specific findings of fact required—value

The trial court erred in a partition by sale of real property by determining that an actual partition of the pertinent property could not be made without causing substantial injury to one or more of the interested parties. The trial court failed to make specific findings of fact necessary to support an order for partition by sale of the parcels under N.C.G.S. § 46-22, including the value of each individual parcel and the value of each share of the parcels if they were to be physically partitioned.

2. Real Property—partition by sale—factors—personal value—difficulty of physical partition—highest and best use of parcels—substantial injury—owelty

The trial court erred in a partition by sale of real property by utilizing factors such as the personal value of the parcels to the parties, the difficulty of physical partition, and the "highest and best use" of the parcels in concluding that substantial injury would result by physical partition. Until the trial court made the requisite findings regarding the fair market value of the parcels, it could not decide whether owelty (the ability of a court to order that a cotenant who receives a portion of the land with greater value than his proportionate share of the property's total value to pay his former cotenants money to equalize the value) was appropriate under N.C.G.S. § 46-22(b1).

Appeal by Lisa H. Debruhl and J. Delaine Debruhl (collectively, "the Debruhls") from the Order entered on 28 April 2016[1] and the Corrected

1. We note that this Order is unsigned and undated, and that the Order's file stamp is illegible so it cannot be confirmed that it was entered on 28 April 2016 as the Notice of Appeal alleges. The record index bears an alternative entry date of 12 April 2016. However, since the Order was amended by the Corrected Order issued on 3 May 2016, there are no jurisdictional issues with this appeal.

Order entered on 3 May 2016 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 3 May 2017.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk, for Petitioners-Appellees Janet H. Solesbee and Carl Solesbee.

Westall, Gray & Connolly, P.A., by J. Wiley Westall, III, for Respondents-Appellees Cheryl H. Brown, Roger Brown, Gwenda H. Angel, and Wesley Angel.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Robert B. Long, Jr., for Respondents-Appellants Lisa H. Debruhl and J. Delaine Debruhl.

MURPHY, Judge.

The Debruhls appeal from an order requiring the partition by sale of all parcels at issue in this action. On appeal, the Debruhls argue that the trial court erred in finding and concluding that: (1) a partial physical partition of the lands cannot be made without causing substantial injury to one or more of the interested parties; and (2) Janet H. Solesbee and Carl Solesbee (collectively, "the Solesbees"), who sought a partition by sale of the real property, could later pursue an in-kind allotment if the trial court decided against ordering the sale of the parcels, thereby complicating the partial actual allotment sought by the Debruhls. After careful review, we reverse the trial court's decision and remand the case so that the trial court can make the specific findings of fact required by law and then re-examine its conclusions of law.

I. Background

Janet H. Solesbee, Cheryl H. Brown, Gwenda H. Angel, and Lisa H. Debruhl are sisters (collectively, "the Sisters"). Each sister inherited a one-fourth, undivided interest in the real property at issue, located in Asheville, as tenants in common from their father, Walter Honeycutt. The property is comprised of multiple parcels, which were designated as Parcel One, Parcel Two, and Parcel Three by the trial court (collectively, "the Parcels"). The Solesbees and the Debruhls individually own and reside on real property adjacent to Parcels Two and Three. The Parcels and the residences are all zoned for residential use.

On 9 January 2015, the Solesbees petitioned for a partition by sale of the Parcels.[2] The Browns and Angels filed a response to the petition, and they also admitted that a sale was necessary. The Debruhls filed a separate answer to the petition, acknowledging that Parcel One should be sold but also requesting an in-kind allotment of Parcels Two and Three that adjoin their residential property.

On 28 December 2015, the Clerk of Buncombe County Superior Court ordered the Parcels be sold by private sale. The Debruhls timely appealed to the Superior Court. On 3 May 2016, the trial court issued its Corrected Order, in which it concluded that: (1) an actual partition of the lands could not be made without causing substantial injury; and (2) the fair market value of each cotenant's share in an actual partition would be materially less than the amount each cotenant would receive from the sale of the whole.

The trial court arrived at this conclusion after comparing the fair market value of Parcels Two and Three to one-fourth of the combined fair market value of all of the Parcels as a whole. Since the trial court found that "[i]t is inevitable" that the Parcels will be rezoned for commercial use, which would bring "a far higher value for the property than residential use," it assigned a range of fair market values for each Parcel as opposed to a specific value. Specifically, the trial court found that, since "Parcel One is currently zoned for residential use, but could likely be re-zoned for commercial use," the "fair and reasonable market value of Parcel One . . . [was somewhere between] $190,000.00 to $300,000.00." For Parcel Two, the trial court found that "[i]n light of the nature of Parcel Two, including being encumbered by numerous sewer line and road easements, extremely steep and rocky terrain, flood plains, and erratic shape, there is practically no useable land on Parcel Two, except as presently being used," making the "fair and reasonable market value of Parcel Two . . . $19,550 to $20,000." Finally, the trial court found that there was "practically no or very limited useable land on Parcel [Three]," making the "fair and reasonable market value . . . $16,800.00 to $30,000.00."

The trial court then found that the combined value of Parcels Two and Three was $36,350 to $50,000, and that the fair market value of all the Parcels was "$225,350 to $350,000, with a one-fourth interest in

2. Although the Sisters' husbands are not record owners of the Parcels, each husband is a proper party to this action because they have inchoate marital interests in the Parcels.

all the Parcels being $56,337.50 to $87,500."[3] Accordingly, the trial court found that "[t]he fair market value of Parcels Two and Three combined ($36,500[4] to $50,000) is substantially less than one-fourth of the total fair market value ($56,337.50 to $87,500)."

In determining that actual partition would result in substantial injury, the trial court considered these values as well as: (1) the personal value of the Parcels to the parties; (2) the difficulty of physical partition; and (3) the "highest and best use" of the Parcels. Based on these considerations, the trial court ordered that all of the Parcels be sold together as one, or, alternatively, that Parcel One be sold individually and Parcels Two and Three be sold together, whichever would bring the highest sale price. The Debruhls timely appealed from the Corrected Order.

II. Standard of Review

When the trial court sits without a jury:

> [T]he standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable de novo.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235-36, 695 S.E.2d 818, 821 (2010) (emphasis omitted). "[W]hether a partition order and sale should issue is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law." *Whatley v. Whatley*, 126 N.C. App. 193, 194, 484 S.E.2d 420, 421 (1997).

III. Analysis

The Debruhls do not dispute any of the trial court's findings of fact regarding the valuation of the Parcels, and therefore those findings are binding on appeal. *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, ___ N.C. App. ___, ___, 781 S.E.2d 840, 842 (2016). However, the Debruhls do dispute: (1) whether some of the findings are truly conclusions of

3. We note that the sum of $36,350 and $190,000, the value of Parcel One, is $226,350, not $225,350, making the one-fourth interest in all Parcels $56,587.50, not $56,337.50.

4. We also note that the trial court refers to the combined fair market value of Parcels Two and Three as $36,500 here, but that the earlier reference to those same Parcels noted their valuation was $36,350, as the sum of $19,550 and $16,800 is $36,350, not $36,500.

law; and (2) whether the findings support the trial court's conclusion that substantial injury would occur if a partition in kind were ordered.

We conclude that the trial court erred in its determination that an actual partition cannot be made without causing substantial injury to one or more of the interested parties because the trial court failed to make the specific findings of fact necessary to support an order for partition by sale of the Parcels. Particularly, the trial court failed to make specific findings of fact as to: (1) the value of each individual Parcel; and (2) the value of each share of Parcels Two and Three, were those Parcels to be physically partitioned. Accordingly, we need not address the issue of whether the trial court erred in concluding that the Solesbees could seek an in-kind allotment post judgment.

A tenant in common is entitled, as a matter of right, to a partition of lands in which she has an interest so that she may enjoy her share. *Brown v. Boger*, 263 N.C. 248, 256, 139 S.E.2d 577, 582 (1965). The law favors partition in kind because it "does not . . . compel a person to sell his property against his will, which . . . should not be done except in cases of imperious necessity." *Id.* at 256, 139 S.E.2d at 582-83. On that basis, a court will not deny a property owner's right to a partition in kind simply because her cotenants prefer a sale of the property over physical partition or because there are slight disadvantages to it. *Id.* at 256, 139 S.E.2d at 583. Further, "[s]ince partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages . . . in pursuing such method." *Id.* at 256, 139 S.E.2d at 583.

Before a trial court can order a partition by sale, then, the trial court must consider whether, by a preponderance of the evidence, "an actual partition of the lands cannot be made without *substantial injury* to any of the interested parties." N.C.G.S. § 46-22(a) (2015) (emphasis added). To overcome the presumption in favor of physical partition, the law requires:

> (b) In determining whether an actual partition would cause "substantial injury" to any of the interested parties, the court shall consider the following:
>
> (1) Whether the *fair market value* of each cotenant's share in an actual partition of the property would be *materially less* than the amount each cotenant would receive from the sale of the whole.
>
> (2) Whether an actual partition would result in *material* impairment of any cotenant's rights.

> (b1) The court, in its discretion, shall consider the remedy of owelty where such remedy can aid in making an actual partition occur without substantial injury to the parties.
>
> (c) The court shall *make specific findings of fact* and conclusions of law supporting an order of sale of the property.
>
> (d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.

N.C.G.S. § 46-22(b)-(d) (emphasis added).[5] In parsing the language of this statute, this state's appellate courts have addressed: (1) whether slight economic disadvantage or convenience are sufficient justifications for ordering a partition in kind; (2) what specific findings a trial court must make before ordering partition in kind; and (3) whether those requisite findings may be circumvented based on the difficulty of physically partitioning the property at issue.

At times, physical partition can be hampered by the nature of the property at issue. The issue of difficulty of physical partition was addressed by our Supreme Court in *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965). In that case, our Supreme Court considered the appropriateness of a partition by sale of a roughly 1,250 acre property with irregular boundaries as well as different types and grades of land. *Id.* at 252, 139 S.E.2d at 580. The trial court had found that, "from an economic standpoint," it was in the best interest of the petitioners to sell the property as a whole as actual partition of the lands would cause "financial detriment to those who want to sell," and that the petitioners would "receive more from the sale of the lands as a whole" than they would receive from "the sale of that portion of the lands which would be allotted to them in an actual partition." *Id.* at 253-54, 139 S.E.2d at 581.

On review, our Supreme Court, however, held that "[s]ince partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages . . . in pursuing such method." *Id.* at 256, 139 S.E.2d at 583. Furthermore, "[a] sale will not be ordered merely for the convenience of one of the cotenants" because "[t]he physical difficulty

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5. In 2009, the General Assembly amended N.C.G.S. § 46-22(c) to "clarify the standard for determining what constitutes 'substantial injury.' " 2009 North Carolina Laws S.L. 2009-512 (H.B. 578). The phrasing changed from "the court shall specifically find the facts supporting an order of the sale of the property" to "the court shall *make specific findings of fact* and conclusions of law supporting an order of sale of the property." *Id.* (emphasis added).

of division is only a circumstance for the consideration of the court." *Id.* at 256, 139 S.E.2d at 583. In that case, the trial court failed to find "that the 1250 acres of land [could] not be divided so that seven-tenths in value could be allotted to the plaintiffs and three-tenths in value to defendants." *Id.* at 257, 139 S.E.2d at 583. As such, the Supreme Court asked, "[i]f the land will bring more as a whole, how much more? Will the difference be so material and substantial as to make an actual partition unjust and inequitable?" *Id.* at 259, 139 S.E.2d at 585. As the trial court's findings failed to answer those questions, our Supreme Court reversed and remanded the case so that the trial court could make the requisite findings. *Id.* at 259, 139 S.E.2d at 585.

Almost three decades later, in *Partin v. Dalton*, 122 N.C. App. 807, 436 S.E.2d 903 (1993), this Court later considered whether a partition by sale was proper where "neither party presented any evidence as to the current value of the land at the time of trial, nor as to what the value of the land would be were it to be actually partitioned." *Id.* at 809, 436 S.E.2d at 905. Petitioners in that case only presented evidence that "the acreage nearest Haystack Road was worth roughly $700 per acre" and then provided that "the acreage at the eastern end of the property" was "worth $200 or $400 per acre depending on whether there was a means of access to the property." *Id.* at 809, 436 S.E.2d at 905. Based on this evidence, that trial court concluded that an actual partition could not be made without causing substantial injury. *Id.* at 812, 436 S.E.2d at 906.

On appeal, however, this Court disagreed and held that, to be upheld, the trial court's findings of fact "must be supported by evidence of the value of the property in its unpartitioned state *and evidence of what the value of each share of the property would be were an actual partition to take place*." *Id.* at 812, 436 S.E.2d at 906 (emphasis added). As such, based on the lack of evidence before it, this Court concluded that the "trial court failed to make the required findings of fact that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale." *Id.* at 812, 436 S.E.2d at 906. Accordingly, we reversed and remanded the case for a new trial. *Id.* at 812, 436 S.E.2d at 906.

This Court also recently addressed whether the requirement of specific findings can be circumvented based on the difficulty of physically partitioning the land. In *Lyons-Hart*, the trial court's findings only established that "the property would be difficult to partition in-kind" because, among other things, the property was "very irregular" and the boundary was "not well established." 205 N.C. App. 232, 238, 695 S.E.2d 818, 822

(2010). Once again, "the trial court made no findings regarding the value of the property in its unpartitioned state [or] the value of the land should it be divided" before it concluded that a physical partition could not be made without causing substantial injury to some or all interested parties. *Id.* at 235, 238, 695 S.E.2d at 820, 822.

As in *Partin*, this Court reversed the decision of the trial court and held that it "must consider evidence of fair market value in determining whether a substantial injury would result from a partition in-kind." *Id.* at 235, 695 S.E.2d at 820. Thus, "despite evidence that the partition in-kind would be difficult, this Court required a showing of fair market value" in order to sustain a conclusion regarding substantial injury even where there was testimony concerning the value of the property. *Id.* at 235, 695 S.E.2d at 820.

A. Specific Findings

[1] In the instant case, just as in *Brown*, *Partin*, and *Lyons-Hart*, the trial court erred in determining that physical partition would cause substantial injury when it did not first consider the fair market value of the Parcels should they be physically divided. Although the trial court considered the combined fair market value of Parcels Two and Three in comparison to the one-fourth interest in *all* parcels, those assessments only indicate the value of the land should it be transferred to only one of the tenants in common. However, there was no evidence as to what the value of the land would be if Parcels Two and Three were physically divided and transferred to several of the tenants in common.

Since the trial court found in finding of fact 21 that, if it were to order a partition in kind of Parcels Two and Three, one or more of the other tenants in common could also request a portion, the trial court necessarily needed to determine the value of those Parcels if that possibility came to fruition. As the trial court's findings fail to indicate the fair market value of Parcels Two and Three if they were divided, they cannot support that court's conclusion that each cotenant's share would be "*materially* less [upon physical partition] than the amount each cotenant would receive from the sale of the whole." N.C.G.S. § 46-22(b)(1) (emphasis added).

As this matter will be remanded, for purposes of judicial economy we also note that the trial court's findings as to the fair market value of the Parcels additionally fail to satisfy the requirements of N.C.G.S. § 46-22 in that, although the trial court acknowledged that the current zoning classification of the Parcels "does not allow commercial or industrial use," it nevertheless considered the possibility that the Parcels

would be rezoned for commercial use at a later date to determine the fair market value of each Parcel. Since commercial use would bring "a far higher value for the property than residential use," the trial court assessed each Parcel's value based on the lower residential and higher commercial value. As a result, instead of assigning precise fair market values, each Parcel was assigned a sweeping range of possible values. For example, the largest discrepancy existed in relation to Parcel One, which the trial court found was valued somewhere between $190,000 and $300,000 – with a $110,000 difference between the lowest and highest possible fair market value. Since it is clear from the language of N.C.G.S. § 46-22 and our caselaw that *specific* findings of fact must support an order for the sale of property based on substantial injury, these sweeping ranges cannot be upheld.

B. Substantial Injury

[2] Instead of looking at the fair market value were it physically partitioned, the trial court in this case considered: (1) the personal value of the Parcels to the parties; (2) the difficulty of physically partitioning the land; and (3) the "highest and best use" of the Parcels.

In regard to the personal value of the property, the trial court considered the conflicting desires of the Debruhls and Solesbees and how their ownership of adjacent property affects their interests in the Parcels at issue. Specifically, it considered the fact that the Debruhls hope to continue living on their property and "want[ ] all or a portion of Parcels Two and Three as a buffer to the growing commercial use of the properties," while the Solesbees desire to sell Parcels Two and Three for commercial use in order to increase the fair market value of their residential property. As such, the trial court found that transferring Parcels Two and Three to the Debruhls "would be an improper favoritism to [them]" and "unequitable and unfair to the other tenants in common," especially the Solesbees, since they also reside near the Parcels.

It is clear from N.C.G.S. § 46-22 and our caselaw that economic factors alone control whether substantial injury exists to disturb the status quo of partition-in-kind. *Partin*, 112 N.C. App. 807, 436 S.E.2d 903; *Lyons-Hart*, 205 N.C. App. 232, 695 S.E.2d 818. Although *material* impairment of any cotenant's rights must be considered in determining whether an actual partition should be ordered, personal value or desired use of the property does not affect *material* impairment of any rights.

Second, the trial court considered the difficulty of physical partition. Specifically, the trial court found that "[d]ue to the saturation of

Parcels Two and Three with easements, and their geographical and shape limitations on use and access across these Parcels, there is no practical way to fairly and equitably divide these parcels into two to four parcels." However, as we have already established, *Brown* makes clear that specific findings as to the fair market value of a piece of property cannot be circumvented by the difficulty of physical partition. In order to deal with land that is difficult to partition physically and to help balance each party's share, N.C.G.S. § 46-22(b1) requires a court to consider owelty. Owelty refers to the ability of a court to order that "a cotenant who receives a portion of the land which has a greater value than his proportionate share of the property's total value, to pay his former cotenants money to equalize the value received by each cotenant." *Partin*, 112 N.C. App. at 812, 436 S.E.2d at 906.

Specifically, N.C.G.S. § 46-22(b1) requires that "the court, in its discretion, *shall* consider the remedy of owelty where such remedy can *aid in making an actual partition occur* without substantial injury to the parties." (Emphasis added). Although in the present case the trial court did conclude that owelty was not an appropriate remedy, that determination cannot be upheld, even with the discretion granted to the trial court, because the trial court's conclusion was based on inappropriate findings. Until the trial court makes the requisite findings regarding the fair market value of the Parcels, it cannot decide whether owelty is an appropriate.

Finally, the trial court determined that "[o]ffering Parcels Two and Three with Parcel One for sale [would] bring the tenants in common the highest value for the property as a whole" and that "[i]n reality the highest and best use of Parcels Two and Three is to combine them with adjoining property for commercial use." However, such conclusions fail to satisfy the standards required by N.C.G.S. § 46-22. N.C.G.S. § 46-22 does not state that "highest and best use" of the land should factor into the determination of whether actual partition would cause substantial injury. As such, physical partition does not work a substantial injury simply because it would not be the "highest and best use" of the land.

The trial court erred by failing to make specific findings as to the value of each Parcel and the value of each share of the Parcels were those Parcels physically partitioned. It further erred in utilizing factors such as the personal value of the Parcels to the parties, the difficulty of physical partition, and the "highest and best use" of the Parcels in concluding that substantial injury would result by physical partition.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order and remand with instructions for the trial court to make the specific findings of fact required by N.C.G.S. § 46-22 and our caselaw.

REVERSED AND REMANDED.

Judge CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY, D/B/A DOMINION NORTH CAROLINA POWER, DEFENDANTS

v.

NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, PLAINTIFF

No. COA16-811

Filed 19 September 2017

Utilities—solar panels on church—electricity sold to church—public utility

Plaintiff was operating as a public utility and was subject to regulation by the Utilities Commission when it placed solar panels on the roof of a church, retained ownership of the panels, and sold the electricity to the church. Although plaintiff only sought to provide affordable solar electricity to non-profits, a subset of the population, approval of its activity would open the door for other organizations to offer similar arrangements to other classes of the public, upsetting the balance of the marketplace and jeopardizing regulation of the industry. Its activity was contrary to the North Carolina public policy intended to provide electricity to all at affordable rates.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 15 April 2016 by the North Carolina Utilities Commission. Heard in the Court of Appeals 23 February 2017.

Staff Attorney Robert B. Josey, Jr. and Staff Attorney David T. Drooz, for Defendant-Appellee Public Staff – North Carolina Utilities Commission.

Allen Law Offices, PLLC, by Dwight W. Allen and Lawrence B. Somers, for Defendants-Appellees Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC.

McGuireWoods, LLP, by Brett Breitschwerdt and Andrea R. Kells, for Defendant-Appellee Virginia Electric & Power Company, d/b/a Dominion North Carolina Power.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn and John D. Runkle for Plaintiff-Appellant North Carolina Waste Awareness and Reduction Network.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for amicus curiae North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1 and Electricities of North Carolina, Inc.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason, for amicus curiae North Carolina Electric Membership Corporation.

Southern Environmental Law Center, by David Neal and Lauren Bowen, for amicus curiae North Carolina Interfaith Power and Light, North Carolina Council of Churches, Greenfaith, The Christian Coalition of America, Young Evangelicals for Climate Action, and Creation Care Alliance of Western North Carolina.

MURPHY, Judge.

Plaintiff North Carolina Waste Awareness and Reduction Network ("NC WARN") appeals from an order of the North Carolina Utilities Commission (the "Commission") concluding that NC WARN was operating as a "public utility," subject to the Commission's jurisdiction, when it entered into an agreement with a Greensboro church (the "Church") to install and maintain a solar panel system on the Church's property and to charge the Church based on the amount of electricity that the system generated. The Commission also concluded that NC WARN's actions constituted a provision of "electric service" to the Church, infringing on the utility monopoly of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, (collectively "Duke Energy") in violation of Chapter 62 of the North Carolina General Statutes.

We agree and conclude that NC WARN is acting as a "public utility" by operating its system of solar panels for the Church on the Church's property. Therefore, we affirm the order of the Commission.

Background

In December 2014, NC WARN entered into a "Power Purchase Agreement" (the "Agreement") with the Church. The Agreement provided that NC WARN would install and maintain a system of solar panels on the Church's property. Under the Agreement, the solar panels would "remain the property of NC WARN" and the Agreement did not "constitute a contract to sell or lease" the solar panels to the Church. In exchange, the Church agreed to compensate NC WARN based on the amount of "electricity produced by the system" at a rate of $0.05 per kWh.

In June 2015, NC WARN filed a request with the Commission for a declaratory ruling that its proposed activities under the Agreement would not cause it to be regarded as a "public utility" pursuant to the Public Utilities Act (the "Act").

The Commission, however, concluded that NC WARN's arrangement with the Church constituted a public utility in violation of the Act. In addition, the Commission ordered that NC WARN refund its charges to the Church and pay a fine of $200 for each day that NC WARN provided electric service to the Church through the solar panel system.[1] NC WARN timely appealed the Commission's order.

Analysis

The dispositive issue on appeal is whether the Commission correctly determined that NC WARN was operating as a "public utility." *See State ex rel. N.C. Utils. Comm'n v. New Hope Rd. Water Co.*, 248 N.C. 27, 29, 102 S.E.2d 377, 379 (1958) ("The Commission has no jurisdiction over these respondents unless they are public utilities within the meaning of [the Public Utilities Act]."). This issue is a question of law, which is reviewed de novo by our Court. N.C.G.S. § 62-94(b) (2015) ("[T]he court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."); *New Hope*, 248 N.C. at 30, 102 S.E.2d at 379 ("[T]he question of whether or not a particular company or service is a public utility is a judicial one which must be determined as

1. The Commission also provided that all penalties imposed "shall be waived upon NC WARN's honoring its commitment to refund all billings to the Church and ceasing all future sales."

such by a court of competent jurisdiction."); *State ex rel. Utils. Comm'n v. Envir. Defense Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011) ("Questions of law are reviewed *de novo*.").

The Public Utilities Act, found in Chapter 62 of our General Statutes, gives the Commission the power to supervise and control the "public utilities" in our State. N.C.G.S. § 62-30 (2015). A "public utility" as defined in the Act is any entity which owns and operates "equipment and facilities" that provides electricity "to or for the public for compensation." N.C.G.S. § 62-3(23)(a) (2015).

In the present case, there is no doubt that NC WARN owns and operates equipment (a system of solar panels) which produces electricity and that NC WARN receives compensation from the Church in exchange for the electricity produced by the system. The dispute here is whether NC WARN is producing electricity "for the public," therefore, making it a "public utility."

"The public does not mean everybody all the time." *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 522, 246 S.E.2d 753, 755 (holding that the defendant was offering his two-way radio communication service to "the public" even though he was offering the service exclusively to members of the Cleveland County Medical Society, which was comprised of only 55 to 60 people) (citation omitted). Instead:

> One offers service to the 'public' within the meaning of [N.C.G.S. § 62-3(23)(a)(1)] when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier.

State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1966) (offering his mobile radio telephone service in the Kinston area to an anticipated 33 subscribers). However, this framework "is merely the beginning and not the end of our inquiry[,]" as a person might still be offering his services to the "public" even when he serves only a selected class of persons. *Simpson*, 295 N.C. at 525, 246 S.E.2d at 757. In further deconstructing the definition of "public," within the context of a selected class of consumers our Supreme Court instructed that whether an entity or individual is providing service to the "public":

> depends . . . on the regulatory circumstances of the case . . . [including] (1) nature of the industry sought to be

> regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

Id. at 524, 246 S.E.2d at 756. This interpretation is meant to be flexible so as to adjust according to "the variable nature of modern technology," and, ultimately, the touchstone of our analysis is: what "accomplish[es] the legislature's purpose and comports with its public policy." *Id.* at 524, 246 S.E.2d at 757 (citation and internal quotation marks omitted).

i. *The Simpson Factors*

In the instant case, NC WARN seeks "to provide affordable solar electricity to non-profits." If we uphold the Agreement NC WARN has in place with the Church, NC WARN would like "to provide similar projects to other non-profits in the future." In that way, NC WARN serves, or seeks to serve, a subset of the population, just as the defendant did in *Simpson*. Therefore, in order to evaluate whether this activity violates the Act, we must consider the factors outlined by our Supreme Court.[2]

Discussion of (1) the nature of the industry and (2) type of market served by the industry overlap. The Greensboro area has been assigned exclusively to Duke Energy, just as other regions of the state are exclusively assigned to other electricity suppliers. North Carolina law precludes retail electric competition and establishes regional monopolies on the sale of electricity based on the premise that the provision of electricity to the public is imperative and that competition within the marketplace results in duplication of investment, economic waste, inefficient service, and high rates. *Carolina Tel. & Tel. Co.*, 267 N.C. at 271, 148 S.E.2d at 111 ("[N]othing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service."). In particular, although the provision of electricity might be lucrative in some areas, it may also be costly in others. Monopolies exist

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2. Even though NC WARN is only offering its services to a subset of the population, it has offered to provide all of the energy produced by the solar system located on the Church's roof to the Church itself, and in this way NC WARN has shown itself to be willing to serve the Church up to the full capacity of NC WARN's facility – in this case up to the full capacity of the solar system at issue. Moreover, the Agreement provides that "any electricity generated by the system, for example, during times of low on-site usage, will be put onto the power grid and credited against the kilowatt (kWh) sold to [the Church] by Duke Energy." The transfer of energy produced by the solar system to the energy grid for unrestricted use by any and all of Duke Energy's Greensboro customers leads us to conclude that NC WARN is in fact "hold[ing itself] out as willing to serve all who apply up to the capacity of [its] facilities." *Id.* at 522, 246 S.E.2d at 755.

in North Carolina so that it makes financial sense for utilities to serve all North Carolinians and so that service can be provided at a reasonable price. *See Simpson*, 295 N.C. at 525, 246 S.E.2d at 757 (recognizing that exempting certain radio service providers from regulation would "leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service").

For these reasons, the legislature has elected to prohibit (3) any competition that might otherwise naturally exist in the market and to limit providers of electricity to specific providers in different regions of the state. *Id.* at 271, 148 S.E.2d at 111. NC WARN's activities are in direct competition with Duke Energy's services, as both entities are selling kilowatt hours of electricity to Duke Energy's customers.

Perhaps most importantly to our review of this case, however, is an evaluation of (4) the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. NC WARN maintains that it only intends to provide its services "to self-selected non-profit organizations" and has no desire to offer its services to all of Duke Energy's customers.[3] However, the Supreme Court of North Carolina previously rejected this same argument in *Simpson* when the defendant argued that he was spared from regulation because he only endeavored to provide his services to the Cleveland County Medical Society. 295 N.C. at 525, 246 S.E.2d at 757. In that case, the Supreme Court concluded, "[w]ere a definition of 'public' adopted that allowed prospective offerors of services to approach these separate classes without falling under the statute, the industry could easily shift from a regulated to a largely unregulated one." *Id.* at 525, 246 S.E.2d at 757.

Simply put, Duke Energy has been granted an exclusive right to provide electricity in return for compensation within its designated territory and with that right comes the obligation to serve all customers at rates and service requirements established by the Commission. NC WARN desires to serve customers of its own choosing within Duke Energy's territory at whatever rates and service requirements it sets for itself without oversight. Although NC WARN at the present date is only providing its services to a small number of organizations in the Greensboro area, if it were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that

3. In its request for declaratory judgment, NC WARN acknowledges its intent to expand this program in stating, "An adverse ruling by the Commission would restrict NC WARN's ability to enter into similar funding mechanisms through [Power Purchase Agreements] with other churches and non-profits, as funds become available." **{R. p. 9}**

activity stands to upset the balance of the marketplace. Specifically, such a stamp of approval by this Court would open the door for other organizations like NC WARN to offer similar arrangements to other classes of the public, including large commercial establishments, which would jeopardize regulation of the industry itself.[4]

ii. *Legislative Intent*

Under *Simpson*, our analysis of whether an entity is selling energy to the "public" ultimately hinges on the query: what accomplishes the legislature's purpose and comports with public policy? *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57 (citation omitted). Chapter 62 of the North Carolina General Statutes contains the Public Utilities Act, which establishes a comprehensive set of regulations for public utilities in the state. The "Declaration of policy" proclaims, *inter alia*, that "[i]t is hereby declared to be the policy of the State of North Carolina: . . . (2) To promote the inherent advantage of regulated public utilities[.]" N.C.G.S. § 62-2(a)(2) (2015). Doing so allows for the "availability of an adequate and reliable supply of electric power . . . to the people, economy and government of North Carolina[.]" *Id.* § 62-2(b). In that way, the declaration clearly reflects the policy adopted by the legislature that a regulated monopoly best serves the public, as opposed to competing suppliers of utility services. *Carolina Tel. & Tel. Co.*, 267 N.C. at 271, 148 S.E.2d at 111.

It is also true that the General Assembly has recently declared that it is also the policy of this state "[t]o promote the development of renewable energy and energy efficiency." N.C.G.S. § 62-2(a)(10); *see also* N.C.G.S. § 105-277 (2015) (exempting from taxation solar systems used to heat a property). However, statutory pronouncements of policy are meant to coexist with North Carolina's well-established ban on third-party sales of electricity rather than supersede it until such time as the monopoly model is abandoned by our legislature. *See Taylor v. City of Lenoir*, 129 N.C. App. 174, 178, 497 S.E.2d 715, 719 (1998) ("[S]tatutes relating to the same subject or having the same general purpose, are to be read together, as constituting one law . . . such that equal dignity and importance will be given to each." (citation and internal quotation marks omitted)).

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4. The Dissent notes that within the last decade the Commission concluded in two separate cases that "similar" arrangements by third-party solar services providers did not turn those providers into public utilities. However, those cases are not before us now, nor are "past decisions of a previous panel of the North Carolina Utilities Commission . . . binding on later panels of the Commission or this Court." *Utils. Comm'n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 131 n. 6, 738 S.E.2d 187, 194 n. 6 (2013). Accordingly, they have no bearing on the present appeal.

If the legislature desires to except these types of third-party sales, it is within its province to do so and it is not for this Court to determine the advisability of any change in the law now declared in the Public Utilities Act. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 257, 166 S.E.2d 663, 668 (1969) ("It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest.").

Conclusion

We hold, therefore, that NC WARN is operating as a public utility within the meaning of N.C.G.S. § 62-3. Consequently, NC WARN is subject to regulation by the Commission. Accordingly, we affirm the order of the Commission from which NC WARN appealed.

AFFIRMED.

Judge STROUD concurs.

Judge DILLON dissents by a separate opinion.

DILLON, Judge, dissenting.

I conclude that NC WARN is not acting as a "public utility" because the solar panel system at issue is not serving "the public," but rather is designed to generate power for a single customer (the "Church") from the Church's property. Therefore, I respectfully dissent.

The Public Utilities Act gives the Commission the power to supervise and control the "public utilities" in our State. N.C. Gen. Stat. § 62-30 (2015). A "public utility" as defined by our General Assembly is any entity which "own[s] or operate[s]" "equipment or facilities" that provide "electricity" "*to or for the public* for compensation." N.C. Gen. Stat. § 62-3(23)(a) (2015) (emphasis added).

I agree with the majority that NC WARN "owns and operates" "equipment" (a system of solar panels) which provides "electricity" "for compensation." However, I disagree with the majority that the equipment at issue here is designed to produce electricity "for the public," because the system of solar panels in this case is designed to produce electricity on the property of a single customer for that customer's sole use.

Our Supreme Court has had occasion to define the contours of what constitutes a "public utility," subject to regulation by our Utilities Commission. But every instance cited by the majority where our Supreme Court has determined that a "public utility" exists involved equipment or a facility which served *multiple customers*. The majority's decision today appears to be the first in North Carolina where equipment designed to generate power (or other utility-type service) for a single customer from the customer's own property is held to be a "public utility" subject to regulation by our Utilities Commission.

In 1958, for instance, our Supreme Court stated that "the true criterion by which to determine whether a plant or system is a public utility is whether or not the public may enjoy it of right or by permission only[.]" *Utilities Comm'n v. New Hope*, 248 N.C. 27, 30, 102 S.E.2d 377, 379 (1958). The Court further stated that "an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal Constitution, void wherever it interferes with private rights of property or contract." *Id.* NC WARN's solar panel equipment at issue here is not designed to be enjoyed by the public either by right or by permission; rather, the system was designed only to be enjoyed by the Church, pursuant to a private contractual agreement.

Ten years later, in 1968, our Supreme Court considered the definition of "the public" in the context of utilities regulation in *Utilities Comm'n v. Carolina Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966), a case in which a company sought to establish a mobile radio telephone service for a small area with an estimated thirty-three (33) customers. Our Supreme Court held that the operation was a public utility, stating:

> One offers service [to] the "public" within the meaning of th[e] statute when he holds himself out as willing to serve all who apply up to the capacity of [his] facilities. . . . For example, the operator of a single vehicle within a single community may be a common carrier.

Id. at 268, 148 S.E.2d at 109. However, NC WARN's solar panel "facility" is markedly different than the "public utility" described by the Supreme Court in this 1968 opinion. Where the "single vehicle" in the Supreme Court's example is designed to serve multiple members of the public, the solar panel equipment at issue here is designed to serve only one customer, and has not been made available to any other customer.

A decade later, in 1978, in the case relied upon by the majority today, our Supreme Court clarified *Carolina Telegraph* by holding that a

system may be serving "the public" even where it serves only a "selected class of persons" and is not designed to serve "everybody all the time." *Utilities Comm'n v. Simpson*, 295 N.C. 519, 522, 246 S.E.2d 753, 755 (1978). In *Simpson*, the Court articulated a list of factors, cited by the majority, which inform whether a particular enterprise is considered a "public utility." I believe the majority applied these factors much more broadly than *Simpson* intends.

In *Simpson*, our Supreme Court provides a guide as to the application of these factors by referencing a number of cases from other jurisdictions, concluding that those cases all "seem correctly decided." *Id.* at 524, 246 S.E.2d at 756. Several of those cases cited concluded that certain operations – each of which were designed to serve multiple customers – constituted "public utilities," where each operation was designed to serve a select class of customers rather than the public at large. However, our Supreme Court also cited a Pennsylvania case which concluded that the furnishing of electric service to tenants of a single apartment building by the building owner (where the owner bought electricity from the public utility company and then resold it to its tenants) did *not* constitute the operation of a public utility: "Here . . . those to be serviced consist only of a special class of persons – those to be selected as tenants – *and not a class opened to the indefinite public*. Such persons clearly constitute a defined, privileged[,] and limited group and the proposed service to them would be private in nature." *Id.* at 524-25, 246 S.E.2d at 756 (quoting *Drexelbrook v. Pennsylvania Public Utility Comm'n*, 418 Pa. 430, 436, 212 A.2d 237, 240 (1965). NC WARN's system is designed to serve a group even more limited (a single customer) than the group served by the system in the Pennsylvania case (tenants in a single building).

In the years since *Simpson* was decided, our appellate courts have applied *Simpson* to determine whether a certain enterprise constituted a "public utility." Many of these cases are cited by the Commission in support of its order. However, unlike the present case, each of those cases involved a system which provided some utility service to *multiple* consumers accessing the system. *See Simpson*, 295 N.C. at 520, 246 S.E.2d at 754 (two-way radio service operated in conjunction with telephone answering service, using tower that serves *multiple* subscribers); *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. Of Adjustment*, 174 N.C. App. 574, 621 S.E.2d 270 (2005) (cellular telephone company operating cellular telephone tower serving multiple customers); *Utilities Comm'n v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987) (sewer and water

service with approximately twenty-five (25) customers served from a single tank); *Utilities Comm'n v. Buck Island, Inc.*, 162 N.C. App. 568, 592 S.E.2d 244 (2004) (facilities used to produce water and treat sewage in housing development); *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 664 S.E.2d 388 (2008), *aff'd*, 363 N.C. 252, 675 S.E.2d 332 (2009) (campground charging the occupants of each campsite for use of electricity from a single system at above-market price).

In conclusion, I believe that our Supreme Court's jurisprudence compels the conclusion in the present case that NC WARN's equipment, which is designed to generate power for a single customer, is *not* a "public utility." This conclusion is also consistent with the General Assembly's declared policy in the Public Utilities Act "[t]o promote the development of renewable energy" and "encourage private investment in renewable energy and energy efficiency." *See* N.C. Gen. Stat. § 62-2(a)(10); *see also* N.C. Gen. Stat. 105-277 (exempting solar panel systems used to heat a property from taxation); *see also Simpson*, 295 N.C. at 524, 246 S.E.2d at 757 (stating that the definition of "public" must "accomplish the legislature's purpose and comport[] with its public policy") (internal marks and citation omitted)).

Further, this conclusion is consistent with the prior opinions of the Commission in *In re Application of FLS YK Farm, LLC*, N.C.U.C. Docket No. RET-4, Sub 0 (April 22, 2009) and *In re Request by Progress Solar Investments, LLC*, N.C.U.C. Docket No. SP-100, Sub 24 (Nov. 25, 2009). In those cases, the Commission concluded that the entities at issue were *not* public utilities where the entities "owne[d] or operat[ed] solar thermal panels located on-site to a single entity pursuant to a 'bargained for' transaction[.]" *Progress Solar*, N.C.U.C. Docket No. SP 100, Sub 24; *FLS YK Farm*, N.C.U.C. Docket No. RET-4, Sub 0. And in *FLS YK Farm*, the Commission noted that "FLS YK Farm will not be holding itself out to provide solar thermal heat production to the general public, but rather plans to sell the BTUs ("British Thermal Units") created by its on-site thermal panels only to the [Inn] and solely for the purpose of heating water owned by [the Inn]."

In the present case, however, the Commission has reached an opposite conclusion in spite of the fact that, like the providers in *FLS YK Farm* and *Progress Solar*, NC WARN owns and maintains the equipment on the property of a single customer which is designed to generate power from the customer's property for the sole use of that customer (and for no other NC WARN customer). The Commission seems to distinguish NC WARN's arrangement with the Church from its prior decisions merely based on the manner NC WARN is being *compensated*

by the Church. Indeed, at oral argument, counsel for the Commission stated that if NC WARN's arrangement with the Church were structured as a lease agreement, rather than as a contract where NC WARN was compensated based on the Church's usage, the Commission would not be challenging the arrangement in court.

However, to me, the manner in which NC WARN and the Church choose for NC WARN to be compensated – based on usage rather than based on a flat rate per month – does not convert NC WARN's solar panel system on the Church's property into a public utility. Indeed, a hardware store renting a portable generator to a homeowner would not be acting as a public utility if it chose to charge the customer, at least in part, based on the power generated by the generator rather than solely at a flat daily rate. Such billing is a logical method by which private parties should be free to contract to account for wear and tear on the system itself. Certainly it is true that the more the system operates, the quicker its components deteriorate and need maintenance, repair, or replacement. And N.C. Gen. Stat. § 62-3(23) does not deem the *form of compensation* relevant to the determination of whether a system is serving "the public." Certainly, the Commission would not argue that Duke Energy would cease operating as a public utility subject to regulation if it changed its billing method to a flat monthly rate for unlimited access to its power grid.

Additionally, I would point out that the fact that NC WARN might, in the future, enter into similar private contracts with other entities seeking to install other solar panel systems does not compel the conclusion that NC WARN is holding itself out as willing to serve "all who apply up to the capacity *of [the] facilit[y]" at issue here*. Indeed, a hardware store does not act as a public utility simply because it leases out more than one generator. The *Simpson* factors focus on the *function of the single system or facility at issue*, *not* the company offering the service, the company's marketing of its service, or the manner of compensation given to the company in exchange for the service. Here, NC WARN is not holding itself out as willing to serve others up to the capacity of the Church's solar system. NC WARN's system will produce electricity solely for the Church and the power generated by the system is not accessible by NC WARN or any other party or entity.[1] I disagree with the

1. The majority notes, in a footnote, that the fact that the excess energy created by the Church's system will be transferred to Duke Energy's power grid "leads us to conclude that NC WARN is in fact 'hold[ing itself] out as willing to serve all who apply up to the capacity of [its] facilities." I am wholly unpersuaded by this characterization, and do not believe there is sufficient information in the record from which we could undertake an informed interpretation of Duke Energy's voluntary net metering credit program.

majority's characterization of the Church itself – a single customer – as "the public." *See Simpson*, 295 N.C. at 524, 246 S.E.2d at 757.

In conclusion, this case does not involve a solar panel farm providing power to multiple customers off-site. It involves solar panel equipment located on the property of a single customer designed to produce power for that customer where no adjacent property owners or other members of the public have the right to tap into the system. Based on the General Assembly's current definition of "public utility," I conclude that NC WARN's system is not a public utility and is thus not subject to regulation by our Utilities Commission. The General Assembly is certainly free to broaden the definition of "public utility" (within constitutional limits). However, based on the General Assembly's current definition and our Supreme Court's jurisprudence, I vote to reverse the Commission's decision regarding this private contract between NC WARN and the Church. *See New Hope*, 248 N.C. at 30, 102 S.E.2d at 380 ("[A]n attempt to declare [NC WARN] to be a public utility where it is inherently not such, is . . . void wherever it interferes with private rights of . . . contract.").

STATE OF NORTH CAROLINA
v.
ERICA DEANNA BRADSHER, Defendant.

No. COA16-1321

Filed 19 September 2017

1. Appeal and Error—record—transcript not provided

The trial court did not err in a prosecution for misdemeanor larceny and injury to personal property, arising from defendant's removal of appliances from a rental property from which she was being evicted, by concluding that defendant was not entitled to a new trial based on the State's inability to provide her with a transcript of the proceedings. An alternative was available that would fulfill the same functions as a transcript and provided the defendant with a meaningful appeal.

2. Larceny—motion to dismiss—sufficiency of evidence—lawful possession of property—conceded error

The State conceded that the trial court erred by denying defendant's motion to dismiss a larceny charge, arising from defendant's removal of appliances from a rental property from which she was

being evicted, where she was in lawful possession of the property at the time she carried it away.

3. Personal Property—injury to personal property—motion to dismiss—sufficiency of evidence—willful and wanton conduct—causation

The trial court erred by denying defendant's motion to dismiss the charge of injury to personal property where the State failed to meet its burden of sufficiently establishing that defendant intended to willfully and wantonly cause injury to the personal property, or that defendant actually caused the damage.

Appeal by Defendant from judgment entered 3 September 2014 by Judge Michael R. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Kathy LaMotte, for the Defendant.

MURPHY, Judge.

Erica Deanna Bradsher ("Defendant") appeals from her convictions for misdemeanor larceny and injury to personal property. On appeal, Defendant first contends that she is entitled to a new trial due to the State's inability to provide her with a transcript of the proceedings in her case, depriving her of her constitutional rights to effective appellate review, effective assistance of counsel, equal protection under the law, and due process of law. Next, Defendant argues, and the State concedes, that the trial court erred in denying her motion to dismiss the larceny charge when she was in lawful possession of the property at the time she carried it away. Finally, Defendant claims that the trial court erred in denying her motion to dismiss when the State failed to meet its burden of sufficiently establishing the elements of injury to personal property causing damage more than $200. We agree that both charges should have been dismissed, and vacate Defendant's convictions.

Background

On 3 September 2014, Erica Bradsher ("Defendant") was found guilty of misdemeanor larceny and injury to personal property causing damage more than $200. She had been renting a home ("old house"), and eventually had difficulty paying her rent. She found a new home

("new house") to live in; however, this home did not yet have appliances installed. Defendant was evicted and ordered to vacate the premises by 2 February 2015. She decided to move some appliances from the old house to the new house until the new appliances arrived. She had planned on returning the appliances before the eviction date; however, she was arrested for felony larceny and injury to personal property before she was able to do so. Defendant was convicted by a jury of nonfelonious larceny and injury to personal property causing damage more than $200, and gave oral notice of appeal.

On 23 September 2014, Defendant was appointed Kathy LaMotte as her appellate counsel. Trial counsel mailed notes to the Appellate Defender's Office on 21 October 2014 in response to a request from the Office of the Appellate Defender. Appellate counsel then attempted to contact the court reporter, Wendy Ricard, to obtain the transcript. Between 14 November 2014 and 11 August 2016, Superior Court Judge (now Supreme Court Justice) Morgan granted over twenty orders extending time to prepare and deliver the transcript. During this time, appellate counsel continued attempting to obtain the transcript from Ms. Ricard, who eventually moved to New York and became unresponsive. Appellate counsel sought advice from the Office of Appellate Defender and involved Court Reporting Manager David Jester to no avail. On 12 November 2015, appellate counsel requested the prosecutor's notes, and repeated this request on 11 February 2016. Appellate counsel also requested notes from Judge (now Justice) Morgan on 18 February 2016, who was unable to produce any given the passage of time. The prosecutor finally agreed to send trial notes to appellate counsel on 17 October 2016. Due to the dereliction of duty by Ms. Ricard, there is no transcript available; however, due to the diligence of appellate counsel, a summary is set out in narrative form along with the trial exhibits. The available narration, as stipulated to by all parties, is presented as follows:

> **Summary**: The case involves charges of Felony Larceny and Injury to Personal Property, based on [Defendant's] undisputed removal of appliances from a rental property she leased ("old house"), but from which she was being evicted. The electricity had been shut off at the old house and she had groceries and an infant. [Defendant] had arranged for a new house ("new house"), which had functioning electricity, but the new house's kitchen appliances had not yet been delivered. Once the new appliances were delivered, she made arrangements to return the old appliances to the old house. Before she could return the

appliances, she was arrested. The arrest occurred on 29 January 2013, after the eviction hearing on 23 January 2013 and before 02 February 2013, ten days later, the date on which she was required to vacate the premises.

Officer Kyle Tippins testified as follows: A Ms. Paylor had seen a refrigerator being loaded about a week prior to 29 January. He found [Defendant] at the new house. All the appliances were located in [Defendant's] new house. She said that she was "about done moving" and asked, "Is this about the fridge?" The power at the old house was off. He was unable to determine whether [Defendant] had fully moved out. [Defendant] stated to him that she felt she still had time left on her eviction, and had the right to use them until the eviction date. [Defendant] stated to him that she had $300 worth of groceries and didn't want them to spoil. [Defendant] stated to him that she was temporarily using them and planned to return them. He noticed no damage to the stove. He noticed a white dishwasher and refrigerator being used. [Defendant] told him that she needed the stove and microwave to heat the baby's bottle. He did not recall [Defendant] saying anything about the power being cut off, and there was nothing in his report about her stating that. The property was released to the landlord that night.

Patrice Wade (Landlord) testified as follows: The house was a starter home. [Defendant] had a baby and stopped working. Ms. Wade worked with her when she stopped paying, would pay half, then pay the other. In December, she contacted [Defendant] but "she would not leave." In January 2013, she began eviction proceedings. The eviction process allowed [Defendant] ten days to vacate the premises. The papers were served on 14 January 2013. On 29 January, she saw a neighbor, Terri Paylor, at a ball game. Ms. Paylor told her that a black refrigerator had been removed about a week earlier. She went to the old house, found the appliances missing and contacted the police. There was no power in the home. She assumed [Defendant] would be there because she still had time left. She described a dent near the top on the side of the refrigerator, and a problem with a hinge on the door, causing a lack of support for the door. She admitted that the damage

could have been caused during moving the refrigerator. She described some scratches on top of the stove, and admitted that the damage could have been caused during the moving of the stove. She filed an insurance claim because of other things also. The homeowner's insurance policy covered the items. She threw out the appliances. The refrigerator was new when they bought it in 2007. [Defendant] replaced the carpet and cloroxed the floor before she left. The electric bill was in [Defendant's] name. The appliances [Defendant] removed were black and the new (replacement) appliances were white.

Judge Morgan denied [Defendant's] motion to dismiss both charges for insufficiency.

Erica Bradsher (Appellant-Defendant) testified as follows: She entered into the lease in November 2011. It was a good relationship at first. Ms. Wade worked with her until July 2013, when [Defendant] had a baby. [The notes are unclear: She and/or the baby were hospitalized for two months.] She began to have trouble paying the rent. On 22 January 2013, the power was disconnected at her old house. At that point, she had a six-month-old baby and a 12-year-old son, plus two other children for whom she shared joint custody. She had a freezer full of breast milk. She had just gotten food stamps and had just purchased groceries. She called her new landlord and received permission to move in early, but was told that the new appliances had not yet been delivered. She did not own appliances, and could not afford to purchase a small refrigerator. She had friends move the old appliances from the old house to the new house on 22 January 2013. It was necessary to remove the refrigerator door to get it into the house. The new appliances were delivered to the new house on 24 January 2013. She sent an email to her father the same day, asking for his help returning the appliances by 02 February. He agreed to help her on 01 February. [This email was read into evidence, and is in the clerk's file.] When the new appliances arrived at the new house, she moved the old refrigerator to the back deck to make room in the kitchen. When the police arrived on 29 January 2013, she let the officer in and cooperated with him. She told the officer that the lights and heat had

> been cut off at the old house, and that she needed the stove to cook and the microwave to heat up bottles. She told the officer that she was just using the appliances temporarily and intended to return them. She was still using the old stove on the day the officer came. The new stove was in a closet, not yet installed. She wanted to get the appliances back to the old house as quickly as she could. The eviction order gave her until 02 February 2013 to vacate, and she needed to get the appliances back by then. She finished moving on 30 January and 01 February. She thought that "they would never know because I would return it before." She knew the appliances were not hers but believed she had a right to use them until 02 February 2013.
>
> In arguing his motion to dismiss, Trial Counsel offered three cases: *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660; *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473; and *State v. Sims*, 247 N.C. 751, 102 S.E.2d 143.
>
> Judge Morgan denied [Defendant's] renewed motion to dismiss both charges.
>
> Nothing further is known regarding instructions or other motions.
>
> The jury found [Defendant] guilty of Misdemeanor Larceny and Injury to Personal Property. Judge Morgan sentenced [Defendant] to 120 days on each conviction, with sentences suspended in favor of 36 months supervised probation.

The following exhibits are also present in the record: The exhibit showing date of tenancy from 16 November 2012 to 16 November 2013, the exhibit showing date of service of Magistrate Summons as 10 January 2013, the exhibit showing date of Magistrate's Order as 23 January 2013 along with the vacate date of 2 February 2013.

Defendant appeals the trial court's denials of her motions to dismiss.

Analysis

[1] Defendant argues that she is entitled to a new trial due to the lack of transcript of the proceedings in the case. She claims that the failure to provide appellate counsel with a transcript violated her right to effective appellate review, effective assistance of counsel, due process of law, and equal protection of the law. We disagree.

"The unavailability of a verbatim transcript does not automatically constitute error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). Instead, in order to show error, "a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error." *Id.* at 651, 634 S.E.2d at 918. Our Supreme Court has stated, "the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *State v. Lawrence*, 352, N.C. 1, 16, 530 S.E.2d 807, 817 (2000).

In the absence of a verbatim transcript, the parties have the alternative option of creating a narration to reconstruct the testimonial evidence and other proceedings of the trial. N.C. R. App. P. 9(c)(1) (2015); *see also Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918 ("[A] party has the means to compile a narration of the evidence through a reconstruction of the testimony given."). Either party may object to issues with the narration, and any disputes are to be settled by the trial court. *Id.* at 651, 634 S.E.2d at 918. Overall, the narration and record must have the evidence "necessary for an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(1)(e).

In the present case, both parties stipulated to the narrative which contains sufficient evidence to understand all issues presented on appeal. Defendant, however, claims to be prejudiced in that "it is impossible to know whether [defendant's] issues were preserved for appeal." This amounts to nothing more than a general allegation of prejudice as there is no concern or dispute over the issues preserved for appeal. There are three main issues raised on appeal by Defendant, one of which being the lack of transcript. There is no debate as to whether the other two issues were preserved for trial. While we acknowledge the difficult circumstance that appellate counsel was put in due to Ms. Ricard's dereliction, we do not find any prejudice. We find that both parties stipulated to the narrative present in the record, and that it paints a sufficient picture for us to provide adequate review of these issues.

[2] In regards to the merits, Defendant assigns error to the trial court for denying her motion to dismiss the charges of misdemeanor larceny and injury to personal property. As the State concedes, and we agree, the trial court erred in denying Defendant's motion to dismiss the charge of larceny as she was in lawful possession of the property at the time she removed it from the real property. *See State v. Bailey*, 25 N.C. App. 412, 416, 213 S.E.2d 400, 402 (1975) (holding there was no taking by trespass where defendant removed furniture from the trailer he was renting

because he was in lawful possession by virtue of his tenancy, and did not have an intent to convert the furniture to his own uses). Defendant also argues that the State failed to meet its burden of sufficiently establishing the elements of injury to personal property causing damage more than $200. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When ruling on a defendant's motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [d]efendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980).

When reviewing the sufficiency of evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. "The [C]ourt is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (citation omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed." *Id.* at 66, 296 S.E.2d at 652 (citation omitted).

[3] Defendant was charged with injury to personal property causing damage more than $200 in violation of N.C.G.S. § 14-160(b) (2015). The State must prove the following four elements for the crime of injury to personal property: "(1) personal property was injured; (2) the personal property was that 'of another'; (3) the injury was inflicted 'wantonly and willfully'; and (4) the injury was inflicted by the person or persons accused." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015). The State must also show that the injury exceeded $200 to escalate the crime from a Class 2 misdemeanor to a Class 1 misdemeanor. *State v. Hardy*, 242 N.C. App. 146, 155, 774 S.E.2d 410, 416-17 (2015). In the present case, it is undisputed that the property was injured, and while Defendant was in lawful possession of the property at the time, the property was in fact owned by Mrs. Wade. Therefore, our relevant inquiries are (1) whether the State proved that the injury was inflicted "wantonly and willfully," (2) whether Defendant is indeed the person who inflicted the injury, and (3) whether the State proved the injury was in excess of $200.

I. Wantonly and Willfully

When used in criminal statutes, "willful" has been defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law." *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982) (citation omitted). "Conduct is wanton when [it is] in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* at 142, 291 S.E.2d at 662 (citation omitted). These two words are meant to refer to elements of a single crime, and generally connote intentional wrongdoing. *State v. Casey*, 60 N.C. App. 414, 416, 299 S.E.2d 235, 237 (1983) (citing *State v. Williams*, 284 N.C. 67, 72-73, 199 S.E.2d 409, 412 (1973)). "When intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the [d]efendant merely intended to do that act." *Brackett*, 306 N.C. at 141, 291 S.E.2d at 662.

In the present case, the State failed to present sufficient evidence to show Defendant intended to cause injury to the personal property. The only evidence found in the record comes from the narration of Mrs. Wade, in which she acknowledges the damage could have occurred during moving. Despite no indication Mrs. Wade was present during any of the moving, there still was not enough to find that Defendant willfully and wantonly injured the property. In its brief, the State attempts to show intent by claiming that since Defendant removed the door to get the refrigerator into the new residence, "[i]t can reasonably be inferred that [Defendant] also had to remove the door of the refrigerator again when she placed it onto her back porch," and as a result, caused a problem with the door hinge. Even assuming, *arguendo*, that this is a reasonable inference from the evidence, it still in no way shows intent to damage, only intent to remove the door. At most, this would illustrate negligence in an attempt to protect the personal property by removing the door in order to fit the refrigerator into the house, rather than risking any scratches or dents by keeping it attached. Further, there is no evidence in the record as to how the stove was dented.

II. The Injury Was Inflicted by the Person Accused

The next element of the injury to personal property at issue here requires the State to prove beyond a reasonable doubt that Defendant was indeed the one who caused the damage to the appliances. The State has failed to provide sufficient evidence of this element. Again, the only evidence the State has presented is the narration of Mrs. Wade claiming that the damage could have occurred during moving. It is unclear

whether this is meant to apply to the moving from the old to the new house, from one area of the new house to another, or from the new house back to the old house. Officer Tippins testified that he "noticed no damage to the stove" when he arrived at the new house on 29 January 2013. This would tend to imply that the damage occurred when the appliances were being returned to the old house. However, nothing in the record infers that Defendant inflicted this damage.

Regardless of when the damage occurred, the State failed to put forth any evidence that Defendant is indeed the one who caused the injury. The record indicates that Defendant was assisted by friends in moving the appliances from the old to the new house, and that she asked her father to assist in moving them back to the old house. Even considered in the light most favorable to the State, there is no evidence that indicates Defendant, not one of her friends, her father, or anyone else who may have helped in moving the appliances, was the individual who caused the damage. The State has failed to meet its burden.

As there was not sufficient evidence as to the elements of the crime, we need not address the valuation of the damage or the proper classification of the misdemeanor.

Conclusion

The State concedes that Defendant should not have been found guilty of larceny, and has failed to present substantial evidence for two of the four elements of injury to personal property. Therefore, we hold that the trial court erred in denying Defendant's motions to dismiss both charges.

VACATED

Judges Hunter, Jr. and Davis concur.

STATE v. CULBERTSON

[255 N.C. App. 635 (2017)]

STATE OF NORTH CAROLINA
v.
SERGIO MONTEZ CULBERTSON

No. COA17-136

Filed 19 September 2017

1. Appeal and Error—appealability—writ of certiorari—lack of subject matter jurisdiction

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 to suspend N.C. R. App. P. 21 to allow defendant's petition and to issue a writ of certiorari solely to address the trial court's lack of subject matter jurisdiction to enter judgment following defendant's guilty plea.

2. Drugs—possession with intent to sell and distribute—marijuana—heroin—near a park—lack of subject matter jurisdiction—failure to allege over age of 21

The trial court lacked jurisdiction to accept defendant's guilty plea or to impose judgments for possession with intent to sell and distribute (PWISD) marijuana near a park or PWISD heroin near a park where the State conceded that neither indictment set forth an allegation that defendant was over the age of 21 and nothing in the record showed any stipulation or admission concerning defendant's age at the time of his arrest.

Appeal by defendant from judgment entered 6 September 2016 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Susannah P. Holloway, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Sergio Montez Culbertson ("Defendant") appeals from judgment entered following his guilty plea to assault inflicting serious physical injury on a law enforcement officer, assault inflicting injury on a law enforcement officer, five drug related charges, resisting arrest, driving while license revoked and a parking violation. The State has filed a

motion to dismiss Defendant's appeal. Defendant also filed a petition for writ of certiorari seeking our review contemporaneously with his brief.

The State's motion to dismiss the appeal is allowed. In our discretion, we invoke N.C. R. App. P. 2 to suspend Rule 21 of the appellate rules, allow Defendant's petition and issue our writ of certiorari. Defendant's petition seeks review of judgments entered upon indictments, which the State concedes are facially invalid and do not provide the trial court with jurisdiction on two charges.

I. Factual Background

At the entry of Defendant's guilty plea, the State forecast the following evidence. On 21 January 2015, Concord Police Officer M. Hanson was on patrol when he saw a truck parked in the street and facing the wrong direction of travel. The truck was parked approximately 900 feet from the boundary of Caldwell Park. Officer Hanson observed Defendant walking away from the truck. Officer Hanson called other officers to inform them he had stopped Defendant and exited his vehicle to speak with Defendant. Concord Police Officer A. J. Vandevoorde arrived at the scene, and the officers conversed with Defendant near Defendant's truck.

Officer Vandevoorde smelled marijuana inside Defendant's truck and asked Defendant for consent to search the vehicle. Defendant consented, but claimed he was having trouble opening the truck door with the key in his possession. Officer Vandevoorde opened the passenger door of the truck. Officer Vandevoorde asked Defendant not to reach inside the truck after they opened the door.

Against Officer Vandevoorde's instruction, Defendant reached into the car as the officer was opening the door. Both officers moved to restrain Defendant from putting his arm inside the truck. Defendant became combative and began to struggle with both officers. The officers discharged their tasers on Defendant several times, but Defendant continued to resist them. Officer Vandevoorde eventually wrestled Defendant onto the ground, where Officer Hanson attempted to place him in handcuffs. During the fight, Defendant yelled "Momma, get my weed out from under the car seat, under the driver's seat."

The officers called in for backup. Several other officers responded to the request for backup and assisted to restrain Defendant and secure him on the backseat of a police car. Officer Vandevoorde searched Defendant's truck and found a diaper bag containing more than 300 grams of marijuana, which was packaged in several smaller bags. Officer Vandevoorde also found a plastic bag, under the driver's seat, which contained several smaller bags of heroin.

Officers Hanson and Vandevoorde both sustained injuries in the fight with Defendant. Officer Vandevoorde sustained scrapes and lacerations on his knees and hands. Officer Hanson injured his anterior cruciate ligament (ACL) and the meniscus of his knee, which led to several surgeries and rehabilitation time to recover.

II. Procedural history

On 29 August 2016, Defendant entered guilty pleas to: assault inflicting serious physical injury on a law enforcement officer (Hanson); assault inflicting injury on a law enforcement officer (Vandevoorde); possession of drug paraphernalia; maintaining a vehicle/dwelling place for the purpose of keeping and selling controlled substances; trafficking in opium or heroin; possession with intent to sell or deliver ("PWISD") marijuana within 1000 feet of a park; PWISD heroin within 1000 feet of a park; and, possession of marijuana.

Defendant was sentenced as a prior record level II offender. Defendant received an active sentence of 90 to 120 months and a fine for the trafficking charge. The court consolidated the offense of PWISD marijuana near a park with one count of assault inflicting serious injury on a law enforcement officer and sentenced Defendant to 29 to 47 months active imprisonment to run consecutively to the trafficking sentence. Defendant's sentences on the remaining counts were suspended, with two consecutive 60 month terms of probation to follow the active sentences.

Subsequently, the parties realized the court and parties had stated incorrect offense class levels and sentences for some of the offenses. In order to correct the sentence, the court did not adjourn the session of court where Defendant's plea was accepted. The court informed Defendant that the resentencing would reduce the amount of active time he would serve, if his probationary sentences were revoked. Defendant nor his counsel asked for and Defendant was not afforded an opportunity to withdraw his guilty plea. Defendant was re-sentenced on 6 September 2016 as follows:

> [T]he Court recognizes that we needed to correct the judgment from last week because we did have an incorrect class on one of the cases in which the Court sentenced. The trafficking sentence will remain the same. The Court will then sentence under the possession with intent to sell or deliver marijuana within a thousand feet of a school in [15 CRS] 50339, to the 29 – minimum 29 maximum 47 months. The Court would then consolidate the felony

> assault on a law enforcement officer inflicting physical injury with that charge. And then with respect to the assault inflicting serious personal injury – physical injury on a law enforcement officer, the Class F, the Court sentences him to the minimum 25 maximum 47 months, suspended for five years, I believe it was, supervised probation.

Upon the rendering of his new sentence, Defendant orally entered notice of appeal. Defendant filed his brief and a petition for writ of certiorari at the same time to seek review of the judgments and sentences imposed against him.

III. Issues raised by Defendant

In his brief and in his petition for writ of certiorari, Defendant contends the trial court lacked jurisdiction to accept his guilty pleas on the charges of trafficking, PWISD marijuana within 1000 feet of a park and PWISD heroin within 1000 feet of a park. Defendant also asserts that his pleas to these charges were not voluntary, because of erroneous statements made at the time of the entry of his pleas.

Further, Defendant argues the State failed to present a sufficient factual basis to support his guilty plea to the assault charges.

IV. Right of Appeal

A. N.C. Gen. Stat. § 15A-1444

[1] Defendant acknowledges he has no right to appeal the judgments entered. "A defendant's right to appeal in a criminal proceeding is entirely a creation of state statute." *State v. Biddix*, __ N.C. App. __, __, 780 S.E.2d 863, 865 (2015) (citing *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002)). Without express statutory authority, a criminal defendant does not have a right to appeal a judgment entered under N.C. Gen. Stat. § 15A-1444. *Id.*; *see also State v. Ahern*, 307 N.C. 584, 605, 300 S.E.2d 689, 702 (1989).

N.C. Gen. Stat. § 15A-1444 provides:

> (a1) A defendant who has . . . entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise,

> the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.
>
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
>
> . . . .
>
> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari . . . .

N.C. Gen. Stat. § 15A-1444 (2015).

Defendant correctly recognizes he raises no issues which provide him an appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(a2). The State's motion to dismiss Defendant's appeal is allowed. Defendant's purported appeal is dismissed.

B. Appellate Rule 21

To support his petition that a writ of certiorari should be allowed, Defendant cites our Supreme Court in *State v. Wallace* that "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at

any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2001).

Defendant asserts the trial court lacked subject matter jurisdiction to accept his guilty plea to the two charges of PWISD marijuana and heroin within 1000 feet of a park. He argues the indictments for these offenses failed to allege the essential element of his age being over 21 at the time of the offenses. Defendant argues indictments charging statutory offenses must allege all of the essential elements of the offenses. Defendant also asserts the trafficking indictment failed to specifically name heroin instead of the general category of opium derivative.

With respect to the two indictments for PWISD, Defendant would present a meritorious claim, were both raised on a motion for appropriate relief. Defendant claims and the State concedes that the indictments for PWISD within 1000 feet of a park failed to allege and did not state that the Defendant's age was over 21 years.

While N.C. Gen. Stat. § 15A-1444(e) provides jurisdiction and affords a defendant the opportunity to seek discretionary appellate review by petition for certiorari, Defendant's petition does not assert any claim or grounds to qualify it for appellate review by certiorari under Appellate Rule 21. N.C. R. App. P. 21.

As such, Defendant's petition for writ of certiorari is subject to dismissal. *See e.g.*, *State v. Nance*, 155 N.C. App. 773, 774-75, 574 S.E.2d 692, 693-94 (2003) ("Defendant [sought] to bring forth a claim that he did not knowingly and voluntarily plead guilty to having attained the status of habitual felon. However, defendant has sought neither to withdraw his guilty plea, nor to obtain any other relief by motion in the superior court. Defendant's claim [was] not one that he may raise on direct appeal pursuant to G.S. § 15A-1444(a)(1) or (a)(2). Further, defendant [had] not lost his right of appeal through untimely action, nor is he attempting to appeal an interlocutory order or seeking review of an order denying a motion for appropriate relief under G.S. § 15A-1422(c)(3).").

Under these facts, we conclude Defendant does not have a right to appeal the issue presented here under N.C. Gen. Stat. § 15A-1444(a)(1) or (a)(2), and Defendant has not asserted any stated grounds under N.C. R. App. P. 21(a)(1) for this Court to issue a writ of certiorari.

Rule 21 "does not provide a procedural avenue for a party to seek appellate review by certiorari of an issue pertaining to the entry of a guilty plea." *Biddix*, __ N.C. at __, 780 S.E.2d at 870; *see also*, *State v. Pennell*,

367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014) ("The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [N.C. Gen. Stat.] § 15A-1415(b) or petitioning for a writ of habeas corpus.").

C. Appellate Rule 2

Under N.C. R. App. P. 2, this Court possesses the discretionary authority to suspend requirements of the North Carolina Rules of Appellate Procedure and issue a writ of certiorari. "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999).

> This assessment- whether a particular case is one of the rare 'instances' appropriate for Rule 2 review- must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected. In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.

State v. Campbell, __ N.C. __, __, 799 S.E.2d 600, 602-03 (2017) (emphasis original) (footnote, internal citations and quotation marks omitted).

This Court must "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend [the] Rule . . . and consider the merits of defendant's fatal variance argument." *Campbell*, __. N.C. at __, 799 S.E.2d at 603.

> Under Appellate Rule 2, our appellate courts have the discretion to suspend the Rules of Appellate Procedure to prevent manifest injustice to a party. N.C. R. App. P. 2; *Biddix*, __ N.C. App. at __, 780 S.E.2d at 868. Furthermore, this court may invoke Rule 2 "either 'upon application of a party' or upon its own initiative.' " *Biddix*, __ N.C. App. at __, 780 S.E.2d at 868 (quoting *Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000)). "This Court has previously recognized the Court may implement

> Appellate Rule 2 to suspend Rule 21 and grant certiorari, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply." *Id.*

State v. Anderson, __ N.C. App. __, __, __ S.E.2d __, __, 2017 WL 3254414, at *7.

In *State v. Biddix*, the defendant asserted the trial court erred in accepting his guilty plea as a product of his informed choice where the terms of his plea arrangement were contradictory. *Biddix*, __ N.C. App. at __, 780 S.E.2d at 865. We held the defendant did not demonstrate and we did not find " 'exceptional circumstances' necessary to exercise our discretion to invoke Appellate Rule 2 . . . ." *Id.* at __, 780 S.E.2d at 868.

In *Anderson*, the defendant pled guilty to a statute which had been determined to be overbroad in another case. On appeal, the State had not offered argument contrary to that previous decision. This Court utilized Rule 2 and suspended our rules where "an independent determination of the specific circumstances of defendant's case reveals that [the] case [was] one of the rare instances appropriate for Rule 2 review in that defendant's substantial rights are affected." *Anderson*, __ N.C. App. at __, __ S.E.2d at __, 2017 WL 3254414, at *7 (citation and internal quotation marks omitted).

The State concedes both indictments for PWISD marijuana and PWISD heroin near a park failed to contain the essential allegation that Defendant was over the age of 21. The State also concedes and it is well settled that "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. De La Sancha Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011) (citing *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975)); *see also State v. Perry*, 291 N.C. 586, 597, 231 S.E.2d 262, 269 (1977) (holding the age of the defendant was an essential element for first degree rape and a conviction could not stand where the State failed to allege the defendant was over the age of 16); *State v. Byrd*, __ N.C. __,796 S.E.2d 405, No. COA16-619, 2017 WL 676960, at *2 (unpublished) (holding the offenses listed in N.C. Gen. Stat. § 90-95(e)(8), PWISD near a child care center, required the State to allege and prove that Byrd was "21 years of age or older" at the time of commission).

Invalid indictments deprive the trial court of its jurisdiction. *Wallace*, 351 N.C. at 503, 528 S.E.2d at 341. Appellate courts may consider challenges to facially invalid indictments at any time, even when not contested at trial. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S.1130, 148 L. Ed. 2d 797 (2001) (citation

omitted); *see also State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003) ("Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.").

After reviewing Defendant's claims and the State's concession of error, in our discretion and in the interest of judicial economy, manifest injustice would occur if Defendant's convictions were allowed to stand on charges, which the trial court did not possess jurisdiction to impose sentence. For these reasons and in the exercise of our discretion under Rule 2, we suspend Rule 21, and issue the writ of certiorari solely to address the trial court's lack of subject matter jurisdiction.

V. Analysis of Merits of Claims

[2] N.C. Gen. Stat. § 90-95(e)(10) provides, "any person 21 years of age or older who commits an offense under [N.C. Gen. Stat. §] 90-95(a)(1) on property that is a public park . . . shall be punished as a Class E felon."

Defendant was charged in count III of the indictment in 15 CRS 50339 as follows,

> the defendant named above unlawfully, willfully, and feloniously did commit a violation of North Carolina General Statute 90-95, possess with the intent to sell and deliver marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act, within 1000 feet of the boundary of real property used as a playground, Caldwell Park, located at 362 Georgia Street Southwest, Concord, North Carolina.

Similarly in count I of the indictment in 15 CRS 50451, Defendant was charged with PWISD heroin in the same park location. Neither indictment sets forth an allegation of Defendant's age or alleges that he is over the age of 21. Nothing in the record shows any stipulation or admission concerning Defendant's age at the time of his arrest.

Based upon the State's concession and this Court's prior holdings, count III in the multicount indictment in 15 CRS 50339 and count I in the multicount indictment in 15 CRS 50451 are fatally deficient. The superior court did not possess jurisdiction to accept Defendant's plea and sentence him on these two counts.

Because these convictions must be vacated, Defendant's entire plea agreement and the judgments entered thereon must be set aside and this matter remanded to the trial court. We express no opinion on the

merits of these two charges. Nothing in this opinion binds the State or Defendant to the set aside vacated pleas or sentences previously entered and vacated or restricts re-indictment.

VI. Conclusion

Defendant's purported appeal of right is dismissed. In the exercise of our discretion under Rule 2, and in the interest of judicial economy, Defendant's petition for writ of certiorari is allowed as set out above.

The trial court did not possess jurisdiction to accept Defendant's plea or to impose judgments to PWISD marijuana near a park in count III of 15 CRS 50339 or PWISD heroin near a park in count I of 15 CRS 50451. These convictions and judgments thereon are vacated.

Since the Defendant pled guilty to these offenses pursuant to a plea arrangement, and the superior court entered consolidated judgments, the entire plea arrangement must be set aside and this matter is remanded to the superior court for further proceedings. In light of our decision, it is unnecessary to and we do not address Defendant's remaining arguments, which are rendered moot with the set aside of the plea arrangement. *It is so ordered.*

APPEAL DISMISSED. PETITION FOR WRIT OF CERTIORARI ALLOWED. VACATED IN PART AND REMANDED.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA
v.
TRAVIS TAYLOR DAIL

No. COA16-1324

Filed 19 September 2017

Sentencing—suspended sentence—conditional discharge—burden of proof—eligibility

The trial court erred in a driving while impaired and drug possession case by entering a suspended sentence rather than a conditional discharge under N.C.G.S. § 90-96 where, notwithstanding the fact that the State had the burden at trial, the trial court did not afford either party the opportunity to establish defendant's eligibility or lack thereof.

Judge BRYANT concurring in separate opinion.

Appeal by defendant from judgment entered 17 November 2015 and order entered 29 March 2016 by Judge Patrice A. Hinnant in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

CALABRIA, Judge.

Where the trial court failed to consider evidence of defendant's eligibility for conditional discharge pursuant to N.C. Gen. Stat. § 90-96, the judgment is vacated and the matter remanded for resentencing.

I. Factual and Procedural Background

On 17 November 2015, Travis Taylor Dail ("defendant") pleaded guilty to driving while impaired ("DWI") and possession of lysergic acid diethylamide ("LSD"). Per the plea agreement, defendant stipulated that he was a record level 1 for felony sentencing purposes, a record level 5 for DWI sentencing purposes, and that he would be placed on probation. In exchange, the State agreed to dismiss multiple additional drug possession charges against defendant. Pursuant to this plea agreement, on

20 November 2015, the trial court sentenced defendant to a minimum of 3 months and a maximum of 13 months' imprisonment in the custody of the North Carolina Department of Adult Correction on the possession of LSD offense. The trial court suspended this sentence, instead sentencing defendant to 12 months of supervised probation. For the DWI offense, the trial court entered a suspended sentence, ordering defendant to be imprisoned for 30 days in the custody of the Misdemeanant Confinement program, and to surrender his license. In both judgments, the trial court entered findings on mitigating factors, finding that these outweighed any aggravating factors.

On 25 November 2015, defendant filed a motion for appropriate relief ("MAR"), alleging that, at the plea hearing, defendant requested to be placed on conditional discharge probation pursuant to N.C. Gen. Stat. § 90-96, given that defendant had not previously been convicted of a felony. In his MAR, defendant further alleged that the trial court erred in both failing to permit conditional discharge, and in failing to make findings as to why conditional discharge was inappropriate. Defendant therefore moved to have his guilty plea withdrawn and the judgment stricken.

On 29 March 2016, the trial court entered an order on defendant's MAR. The trial court found that, pursuant to the plea agreement, defendant stipulated that he was a record level 1 for felony purposes, record level 5 for DWI purposes, and that he would be placed on probation. The trial court also noted that "the defendant enjoyed the benefit of the dismissal of the following charges: felony possession of MDPV; possession of marijuana up to 1/2 ounce; possession of drug paraphernalia; simple possession of clonazepam 90-95 (D) (2); and, felony prescription and labeling 90-106." The trial court determined that defendant, in subsequently requesting conditional discharge, was asking the trial court "to act outside of the plea agreement by placing defendant on the 90-96 deferral program in contradiction to the terms of the plea agreement, a term not negotiated with the State." The trial court also stated that "defendant could not then and cannot now argue for something outside of the plea agreement. While the 90-96 program requires the consent of the defendant, the plea undercuts or supersedes consent to the 90-96 program because the defendant consented to probation as a term of his plea in lieu of the 90-96 program." The trial court concluded that defendant was barred from relief, and denied his MAR.

On 12 April 2016, defendant filed a petition for writ of certiorari, alleging that the judgment against him was entered in error. Also on 12 April 2016, defendant appealed the judgment and denial of his

MAR. On 29 April 2016, this Court granted defendant's petition for writ of certiorari.

On 10 May 2016, the State filed a petition in the North Carolina Supreme Court for writ of certiorari, alleging that this Court lacked jurisdiction to review the denial of defendant's MAR, and seeking review of the 29 April 2016 order granting defendant's petition for certiorari. The State also filed a petition for a writ of supersedeas and motion for temporary stay, pending review of its petition for writ of certiorari. The Supreme Court granted the motion for temporary stay on 16 May 2016.

On 19 August 2016, the Supreme Court entered its order on the State's motions. It dissolved the temporary stay, and denied supersedeas and certiorari. Correspondingly, this Court entered an order recognizing the denial of supersedeas and certiorari by the Supreme Court.

II. Standard of Review

" 'Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.' " *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014) (quoting *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009)).

"[U]nder N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

III. Conditional Discharge

In his first argument, defendant contends that the trial court erred in entering a suspended sentence rather than a conditional discharge. We agree.

Conditional discharge is an alternative sentence made available in N.C. Gen. Stat. § 90-96 (2015). This statute provides that:

> Whenever any person who has not previously been convicted of (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article

> by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.22, or (ii) a felony under G.S. 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

N.C. Gen. Stat. § 90-96(a).

In the instant case, during the plea hearing, defense counsel alleged mitigating factors, and offered the following argument:

> This is his first conviction of any kind. I don't think he has even had a speeding ticket. He's eligible for 90-96, and I'd ask The Court to allow him to participate in that. He will be drug tested regularly while he is in that program, and I'm confident he could stay away from controlled substances. If he doesn't, he will have a conviction on his record.

After discussing some additional mitigating factors, defense counsel once again requested that the trial court "allow [defendant] to participate in the 90-96 probation." Defense counsel also offered to present the court with the paperwork authorizing conditional discharge.

In ruling on the plea agreement, the trial court would not permit conditional discharge, "in that [defendant] has already endured the benefit of dismissal for something else[,]" namely the other drug-related charges. After the trial court orally entered judgment, defense counsel once again raised the issue of conditional discharge. The trial court declined to reconsider. At no point did the State offer any opinion in favor of or against conditional discharge.

Defendant contends that he was eligible to participate in the conditional discharge program, and that the trial court erred in refusing to let him participate in the program. Citing the statute, defendant contends that he was a first-time offender, and he consented to participation in the conditional discharge program, meaning that the statutory language "the court *shall*" constituted a mandate that the trial court could not ignore. In an affidavit filed after the trial court denied defendant's MAR, the assistant district attorney, Jodi Barlow ("Barlow"), also cited the

statute, and explained that the court made no written findings of fact at the time of sentencing as to why defendant was an inappropriate candidate for sentencing under N.C. Gen. Stat. § 90-96. In addition, the plea agreement did not contemplate that the defendant could not be placed on probation pursuant to § 90-96. Finally, according to the affidavit, Barlow also "[did] not agree that the defendant is an inappropriate candidate for 90-96 probation[,]" in reference to the statutory requirement that the trial court could only refuse conditional discharge with the agreement of the district attorney.

"This Court has held that 'use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.' " *State v. Antone*, 240 N.C. App. 408, 410, 770 S.E.2d 128, 130 (2015) (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)). It is clear, therefore, that where an eligible first-time offender consents to sentencing under the conditional discharge program, the "shall" language of N.C. Gen. Stat. § 90-96 constitutes a "mandate to trial judges," and that failure to comply with that mandate constitutes reversible error.

It is undisputed that, at the plea hearing, defendant sought sentencing under N.C. Gen. Stat. § 90-96, and that such a motion could constitute consent to the statute's provisions. The State contends, however, that defendant did not present evidence that he qualified under N.C. Gen. Stat. § 90-96 for conditional discharge. The State notes that N.C. Gen. Stat. § 90-96 does not explicitly state whether the burden is on a defendant to show that he qualifies for conditional discharge, or on the State to show that he does not. As such, the State contends that the burden is on the defendant, and that in the instant case, defendant failed to meet that burden.

N.C. Gen. Stat. § 90-96 is in Chapter 90 of the General Statutes, a chapter entitled "MEDICINE, ALLIED OCCUPATIONS[.]" The applicable article is Article 5, "CONTROLLED SUBSTANCES ACT[.]" *See* N.C. Gen. Stat. § 90-96. Our Court has stated that

> [t]his statute [, North Carolina General Statute § 90-96] does not discuss in further detail the procedures the court should follow when a defendant violates a term or condition. In the absence of specifically enumerated procedures, those procedures set forth in Article 82 of Chapter 15A of our General Statutes regarding probation violations should apply.

State v. Burns, 171 N.C. App. 759, 761, 615 S.E.2d 347, 349 (2005). While North Carolina General Statute § 90-96 has been amended since 2005 when *Burns* was filed, and this case does not deal with the violation portion of North Carolina General Statute § 90-96, we still find *Burns* instructive because it indicates that the general criminal sentencing statutes fill in the gaps in North Carolina General Statute § 90-96. *See id.*

While the State relies upon a series of cases for its argument that the burden of proving a prior record, including a prior expungement, should be upon the defendant, none of the cases address sentencing under North Carolina General Statute § 90-96 or prior record levels; in fact, but for three cases regarding mitigating factors none of the cases are even regarding sentencing. Noticeably missing from the State's citation list is the controlling statute. *See generally* N.C. Gen. Stat. § 15A-1340.14(f) (2015) (requiring the State to bear the burden of proving prior convictions). The general sentencing statutes, which control here, *see Burns*, 171 N.C. App. at 761, 615 S.E.2d at 349, place the burden of demonstrating prior convictions on the State: "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). We hold that, pursuant to the logic in *Burns*, the Chapter 15A provisions control where North Carolina General Statute § 90-96 is silent; therefore, the burden is on the State to establish that defendant is not eligible for conditional discharge by proving defendant's prior record.

Notwithstanding the fact that the State had the burden at trial, it is clear that the trial court did not afford either party the opportunity to establish defendant's eligibility or lack thereof. According to the transcript, since multiple charges against defendant were dismissed pursuant to the plea agreement, the trial court had no inclination to consider conditional discharge. At no point in the proceedings did the trial court acknowledge defense counsel's argument with respect to conditional discharge, except for one remark, when the court stated that it "will not entertain the deferred prosecution in that [defendant] has already endured the benefit of dismissal for something else." Since the trial court used the outdated term "deferred prosecution" instead of "conditional discharge," it is questionable whether the court even recognized defense counsel's argument with respect to N.C. Gen. Stat. § 90-96.

We therefore vacate the trial court's judgment, and remand this matter to the trial court for a new sentencing hearing. The trial court shall follow the procedure for the consideration of eligibility for conditional discharge as prescribed by statute.

North Carolina General Statute § 90-96 addresses the procedure for determining a defendant's eligibility, as is reflected on Form AOC-CR-237, Rev. 12/15. See N.C. Gen. Stat. § 90-96. In fact, the form provides for the trial court to request a report from the Administrative Office of the Courts to determine a defendant's eligibility for a conditional discharge under North Carolina General Statue § 90-96. This report can be requested either in advance of a defendant's trial or guilty plea or at the time of a guilty plea or verdict, the latter situation being applicable to this case. If the report is requested in advance of the trial or plea, *both* the defendant and State must jointly complete the form for entry by the trial court. This procedure ought to have been followed in the instant case, and upon remand, the trial court shall request a report from the Administrative Office of the Courts, as mandated by statute.

IV. Written Finding

In his second argument, defendant contends that the trial court erred in failing to make a written finding regarding whether conditional discharge was appropriate for defendant's sentence. Because we vacate the trial court's judgment, we need not address this argument.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in separate opinion.

BRYANT, Judge, concurring by separate opinion.

I concur with the majority opinion that the trial court erred by failing to follow the mandate of section 90-96. Because defendant met the eligibility requirements of section 90-96 and the assistant district attorney ("ADA") did not state that defendant was "inappropriate for conditional discharge," the statutory mandate required the trial court to enter a conditional discharge.

I write separately to express my concern about how a trial judge can be sandbagged by a defendant who enters a plea agreement that does not expressly include conditional discharge. I use the term "sandbagged" here to mean that a defendant may enter a plea before a judge pursuant to a plea agreement; the agreement may place him within the eligibility requirements of section 90-96, even though the plea agreement does not expressly reference the conditional discharge; and (notwithstanding the

judge's desire) if the ADA does not agree that the conditional discharge is inappropriate, the trial judge may be compelled to enter the conditional discharge. Thus, if a section 90-96 conditional discharge is to be included in a plea agreement between the prosecutor and a defendant, it should be made known to the judge prior to entry of the plea. Otherwise, once a trial judge accepts the plea of a defendant who is statutorily eligible for a section 90-96 conditional discharge, even if the trial judge considers the defendant an inappropriate candidate due to factors related to the offense, the trial judge has no discretion but to allow the conditional discharge, unless the ADA agrees that the offender is inappropriate.

In this case, defendant had prior charges for possessing a weapon on educational property and reckless driving. Both charges were dismissed after completing a deferral program. At the time of the plea agreement, defendant had pending charges for DWI, felony possession of LSD, felony possession of MDPV, felony prescription and labeling, possession of marijuana, possession of drug paraphernalia, and simple possession of clonazepam. The plea agreement allowed defendant to plead guilty to DWI and possession of LSD, and dismiss the remaining drug charges. Because defendant had no prior felony or drug *convictions*, he was eligible for a section 90-96 conditional discharge. Notwithstanding his technical eligibility, it is clear that a reasonable trial judge could consider defendant inappropriate for a section 90-96 conditional discharge because of his other drug charges (involving different types of drugs), which were dismissed as part of the plea agreement and his prior deferments.

As discussed in the majority opinion, there is a form procedure that can be used to determine a defendant's eligibility for the section 90-96 conditional discharge prior to entry of a plea. It appears that District Court judges regularly use this process, while Superior Court judges use it less so. Such a procedure should be used to help ensure that errors of this type do not recur. Also, judges should be vigilant to make sure they maintain their discretion to determine whether to accept or reject a plea by understanding the full extent of the plea bargain. Otherwise, pursuant to the statute, unless the prosecutor (and the defendant) agree that an eligible defendant is not appropriate for a section 90-96 conditional discharge, once the plea is entered, the trial judge must allow the conditional discharge.

STATE OF NORTH CAROLINA
v.
MARVIN BURTON HARRIS, JR., DEFENDANT

No. COA16-1115

Filed 19 September 2017

1. Constitutional Law—effective assistance of counsel—failure to give notice of alibi defense—no trial court order requiring information

Defendant did not receive ineffective assistance of counsel by his counsel's failure to give timely notice of an alibi defense where the trial court never entered an order requiring defendant to disclose the information. Further, defendant was not prejudiced since the jury heard the alibi evidence and the trial court's charge afforded defendant the same benefits as a formal charge on alibi.

2. Sentencing—prior record level—erroneous calculation—harmless error—sentencing within presumptive range

The trial court committed harmless error by its calculation of defendant's prior record level where the trial court's sentence was within the presumptive range at the correct record level.

3. Attorney Fees—indigent defendant—taxing court costs and attorney fees—failure to discuss in open court

A civil judgment imposing fees for court costs and attorney fees against an indigent defendant was vacated without prejudice where neither defense counsel's total attorney fee amount nor the appointment fee were discussed in open court with defendant or in his presence.

Appeal by Defendant from judgment entered 30 October 2015 by Judge Arnold O. Jones, II in Superior Court, Carteret County. Heard in the Court of Appeals 1 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O'Kane Scott, for the State.

Guy J. Loranger for Defendant.

McGEE, Chief Judge.

Marvin Burton Harris, Jr. ("Defendant") appeals from judgments entered after a jury found him guilty of possession of a firearm by a felon, carrying a concealed weapon, and resisting a public officer.

I. Background

Officer Joshua Scales ("Officer Scales"), of the Morehead City Police Department, received a radio dispatch at approximately 2:00 a.m. on 13 November 2014 about a "suspicious subject" in the vicinity of Brook Street in Morehead City, North Carolina. An anonymous female caller described the suspicious person to a 911 operator as a black male with dreadlocks, and reported that the man might have put a black handgun into a backpack. Officer Scales responded to the scene, and saw a man fitting the description given by the caller. Officer Scales stopped his patrol car, identified himself to the man as a police officer, and informed the man that he had "received a call from someone saying that [the man] possibly had a gun on [him]." Officer Scales testified the man "instantly" replied, "[m]an, that girl just mad because I didn't stay the night with her."

Based on the man's actions and body language, Officer Scales testified he had a "real eerie feeling" interacting with the man. Officer Scales repeatedly asked the man if he had something on him that he was not supposed to have. The suspect replied "no," and Officer Scales responded by grabbing the man's backpack. Officer Scales put the backpack on the hood of his patrol car and in doing so "heard a solid thump sound, as in metal . . . hitting metal." This "solid thump" sound allowed Officer Scales to "automatically kn[ow] it was a gun" in the man's backpack. The man took off running towards a tree line. Officer Scales gave chase, but slipped and the man escaped. Officer Scales notified dispatch about the encounter and then opened the backpack.

Among other contents of the backpack, Officer Scales found a black Glock .40 caliber handgun and forty-five pages of documents, including hospital records and a traffic collision report, all of which listed Defendant's full name and birthday. After searching for the man for fifteen to twenty minutes, Officer Scales returned to the police station where he placed the gun in evidence, identified Defendant from a Department of Motor Vehicles' photo as the man he had encountered,[1] and issued a "BOLO" ("Be On The Lookout For") for Defendant. An arrest warrant was issued for Defendant that same night, 13 November 2014, and Defendant later turned himself in to authorities.

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1. At trial, Officer Scales identified Defendant in open court as the man he encountered on 13 November 2014.

Defendant was indicted on charges of possession of a firearm by a felon, carrying a concealed weapon, resisting a public officer, and attaining the status of a habitual felon. Prior to trial, the State filed two motions that requested, *inter alia*, "[n]otice to the State of any defenses enumerated in N.C. Gen. Stat. § 15A-905 that the Defendant intends to offer at trial" as well as the "[d]isclosure of the identity of any alibi witnesses no later than two weeks before trial." Defendant's trial began on 29 October 2015. At trial, Brittany Hart ("Hart") testified to being the 911 caller on 13 November 2014 and to being "absolutely certain" that the man she encountered that night was not Defendant, but rather was a man named Demetris Nolan ("Nolan").

Hart testified that Nolan knocked on her door on 13 November 2014, sometime between 11:00 p.m. and 12:00 a.m., and entered her home. Once Nolan was inside, Hart noticed he was carrying a gun, and Hart asked Nolan to leave. Nolan responded by grabbing a bag that was in her apartment, and quickly leaving. Hart called 911. Hart testified that she observed Nolan placing a gun into the bag he had taken from her apartment. Hart described Nolan as similar in appearance to Defendant: "a tall, skinny, African-American male with dreadlocks." Hart testified Defendant had been at her home two or three days before the incident, and that his bag was at her apartment because she had previously taken him to the hospital. Hart testified she had looked into the bag at some point and had observed only documents therein. Hart testified Defendant had not been in her apartment on the night of 13 November 2014.

Defendant testified that on 13 November 2014 he was in Pamlico County with his girlfriend. He denied being in Hart's apartment, having a weapon, encountering Officer Scales, or running away from anyone in the early morning hours of 13 November 2014. Defendant testified that he had been diagnosed with bilateral pulmonary emboli, or blood clots in the lungs, which caused him to have problems with exertion and physical exercise. Defendant testified he could not run, had trouble speaking, and could barely breathe. Defendant testified that Hart had taken him to the hospital after he was in a hit-and-run accident about a month prior to 13 November 2014. Defendant admitted to owning a blue book bag that he left at Hart's home and that had his accident report and insurance company letters inside.

The trial court initially included a pattern jury instruction on alibi, N.C.P.I. – Crim. 301.10, in its proposed jury instructions. During the charge conference, the State objected to the inclusion of N.C.P.I. – Crim. 301.10, and the following colloquy occurred between the prosecutor, the trial court, and Defendant's counsel:

> [Prosecutor:] . . . Since [Defendant's counsel] didn't give me notice of alibi, I'm going to object to [an instruction on alibi, N.C.P.I – Crim.] 301.10.
>
> THE COURT: There was no notice given. I agree with that. [Defendant's counsel], do you agree that there was no notice given? It just came up here in trial?
>
> [Defendant's counsel:] I certainly would have to agree with that. That's the first time.
>
> THE COURT: I will not instruct on that, but certainly during [closing] argument, I'm sure you will argue what you believe the evidence forecasts in this case. Okay.

The jury found Defendant guilty of possession of a firearm by a felon, carrying a concealed handgun, and resisting, or obstructing or delaying a public officer. The State presented, without objection, certified copies of the three judgments that were used to establish Defendant's prior felony convictions, and Defendant entered a plea of guilty to attaining habitual felon status.

During sentencing, Defendant's counsel informed the trial court that Defendant admitted to the convictions listed on a Form AOC-CR-600B Prior Record Level Worksheet ("the worksheet"). Section I of the worksheet, entitled "Scoring Prior Record/Felony Sentencing," awarded Defendant 8 points for two "Prior Felony Class E or F or G Conviction[s]," 2 points for one "Prior Felony Class H or I Conviction," and 6 points for six "Prior Class A1 or 1 Misdemeanor Conviction[s.]" Despite these numbers totaling 16 points, the trial court made an arithmetic error, and awarded Defendant 17 total points in Section I of the worksheet. An additional point was then added to the total due to "all the elements of the present offense" being "included in any prior offense whether or not the prior offenses were used in determining prior record level."

With the additional point, Defendant's total prior record level points totaled 18 under the trial court's calculation, placing Defendant in the category of a Prior Record Level VI offender. As noted on the worksheet, a Prior Record Level VI offender is any offender with 18 or more prior record level points. Defendant was sentenced to a minimum of 117 months and a maximum of 153 months in prison, in the presumptive range for a Prior Record Level VI offender convicted of a Class C felony. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2015).

At the conclusion of the sentencing hearing, the trial court ordered that Defendant was to be taxed "with the costs of court and attorney fees,

if applicable, if [Defendant's counsel was] court appointed." Defendant's counsel confirmed he was court appointed and informed the trial court that he would prepare the appropriate order for the trial court judge's signature. The trial court ordered that the counsel fees were to be "m[ade] . . . a civil judgment."

On 30 October 2015, Defendant's counsel filed the appropriate form, signed by the trial court judge, which approved 52 hours of work by Defendant's counsel. In Line 4 of Section II of the form, next to "Total Amount," a total of $3,640.00 was ordered to be paid to Defendant's attorney. A criminal bill of costs, dated 2 November 2015, lists $3,640.00 in the "attorney fee and expenses" category and $60.00 in the "attorney appointment fee" category. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) depriving Defendant of his state and federal constitutional right to effective assistance of counsel where his counsel's failure to give timely notice of his alibi defense led the trial court, upon the State's motion, to decline to give an alibi jury instruction; (2) sentencing Defendant as a prior record level VI offender where, due to a miscalculation, the court incorrectly found Defendant had 18 prior conviction points; and (3) imposing attorney's fees and an appointment fee without providing Defendant with sufficient notice and the opportunity to be heard concerning those fees.

A. Ineffective Assistance of Counsel

[1] Defendant argues he received ineffective assistance of counsel when his trial counsel committed a discovery violation, which led the trial court to refuse to give a jury instruction on alibi. In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). This test for ineffective assistance of counsel has also been explicitly adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 167, 557 S.E.2d at 524-25 (citation omitted). Because the cold record reveals that no further investigation is needed, we determine Defendant's ineffective assistance of counsel claim on direct review.

We first examine whether Defendant's counsel was deficient, in that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant argues his trial counsel was deficient because he failed to give notice to the State of Defendant's intent to offer an alibi witness. Defendant reasons that this failure was a violation of the discovery rules contained in N.C. Gen. Stat. § 15A-905, and resulted in the trial court declining to give an alibi jury instruction. We find that Defendant's argument on appeal is trained on the wrong target: the trial court's decision to decline to give an alibi jury instruction was not due to trial counsel's ineffectiveness, but rather due to the trial court's error.

North Carolina's superior court discovery procedures are codified at N.C. Gen. Stat. §§ 15A-901 – 15A-910. A party seeking discovery in superior court must first make a written request that the opposing party voluntarily comply with a discovery request. *See* N.C. Gen. Stat. § 15A-902(a) (2015). If the opposing party provides a "negative or unsatisfactory response" to the discovery request, or fails to respond, then the "party requesting discovery may file a motion for discovery[.]" *Id.* Once the State in a criminal case has provided discovery – either voluntarily

or under a court order – reciprocal discovery by a defendant is governed by N.C. Gen. Stat. § 15A-905. N.C.G.S. § 15A-905 provides, in pertinent part:

> If the court grants any relief sought by the defendant under [N.C. Gen. Stat. §] 15A-903, or if disclosure is voluntarily made by the State pursuant to [N.C. Gen. Stat. §] 15A-902(a), *the court must*, *upon motion of the State*, *order the defendant to . . . [g]ive notice to the State* of the intent to offer at trial a defense of alibi . . . within 20 working days after the date the case is set for trial . . . or such other later time as set by the court[.] . . . As to the defense of alibi, the court *may order*, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial.

N.C. Gen. Stat. § 15A-905(c)(1) (2015) (emphases added).

In the present case, the State filed a document on 27 January 2015 styled as an "answer to Defendant's motion for discovery, notice, and State's request for discovery and disclosure and alternatively motion to compel discovery and disclosure" (all caps omitted) (the "27 January 2015 answer and motion").[2] The 27 January 2015 answer and motion made several disclosures "pursuant to N.C. Gen. Stat. § 15A-901, *et seq.*," such as the State's intent to: (1) call an expert witness; (2) "introduce into evidence a juvenile conviction of [Defendant];" and (3) "introduce a statement . . . made by [Defendant]." The 27 January 2015 answer and motion also requested that Defendant voluntarily provide, among other things, "[d]isclosure of the identity of any alibi witnesses no later than two weeks before trial." If Defendant "fail[ed] to give a satisfactory response or refuse[d] to provide the requested voluntary discovery," the State "respectfully pray[ed] that the [trial court] . . . treat the [State's disclosure requests] as a Motion for Discovery and Disclosure and . . . issue an order compelling [Defendant] to provide the foregoing items," including notice about an alibi witness. The State filed a supplement to its 27 January 2015 answer and motion on 1 September 2015, which included an identical request with respect to Defendant's intent to call an alibi witness.

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2. It is unclear whether the 27 January 2015 answer and motion was filed voluntarily in response to a written request by Defendant for voluntary disclosure, or after a motion for discovery was filed by Defendant pursuant to N.C.G.S. § 15A-902(a). The 27 January 2015 answer and motion is labeled as an "answer to Defendant's motion for discovery," but no such motion by Defendant appears in the record on appeal.

No discovery by Defendant, voluntary or otherwise, appears in the record on appeal in the present case, and Defendant's trial counsel admitted during the charge conference that he did not provide any notice to the State of Defendant's intent to offer an alibi witness. However, a defendant is only required to give notice of an alibi witness after being ordered to do so by the trial court. *See* N.C.G.S. 15A-905 (providing that, after the State has provided discovery to a defendant, "*the court must*, upon motion of the State, *order* the defendant to . . . [g]ive notice to the State of the intent to offer at trial a defense of alibi" (emphases added)). In the present case, it appears – after a review of the record on appeal and transcript of the trial proceedings – that the trial court never entered an order requiring Defendant to disclose the information requested by the State in its 27 January 2015 answer and motion. N.C.G.S. § 15A-905(c)(1) unambiguously states that, once the State has made discovery disclosures, "the court must, upon motion of the State, *order* the defendant to . . . [g]ive notice to the State of the intent to offer at trial a defense of alibi[.]" N.C.G.S. § 15A-901(c)(1). (emphasis added).

A defendant is under no duty to provide discovery until ordered to do so by the trial court, and because the trial court did not order Defendant to "give notice to the State of the intent to offer at trial a defense of alibi," he was under no duty or requirement to do so. Therefore, Defendant's counsel was not deficient in failing to disclose Defendant's intent to offer an alibi witness. Even if the trial court had ordered Defendant to disclose his intent to offer an alibi, the trial court is statutorily required to "make specific findings justifying the imposed sanction" before imposing "any sanction." N.C. Gen. Stat. § 15A-910(d) (2015). The trial court made no findings of fact justifying a discovery sanction and was therefore mistaken in sanctioning Defendant's failure to disclose his alibi witness to the State. This further demonstrates that Defendant's grievance is not with his own counsel, as he argues in his brief, but with the trial court's erroneous imposition of discovery sanctions and failure to give an instruction on alibi.

Even if we were to find that trial counsel's performance was deficient, Defendant is unable to demonstrate that counsel's "deficient performance prejudiced the defense" in that his counsel made "errors . . . so serious as to deprive [Defendant] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Although the trial court declined to give a jury instruction on alibi, the alibi evidence – Defendant's testimony that he was in Pamlico County with his girlfriend at the time of the offense – was heard and considered by the jury.

State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), is instructive. In *Hood*, the defendant presented evidence that he was in another city at the time of the crime with which he was charged. *Hood*, 332 N.C. at 617, 422 S.E.2d at 682. The defendant requested a jury instruction on alibi, and the trial court declined to give such an instruction. *Id.* Although the trial court erred in failing to give the requested instruction, our Supreme Court held that the error did not prejudice the defense due to the instructions that were given to the jury:

> the trial court instructed the jury that the defendant is presumed innocent, that he is not required to prove his innocence, and that the State bears the burden of proving guilt beyond a reasonable doubt. The trial court instructed the jury on the essential elements of the crimes charged, telling the jury that it could not return guilty verdicts unless it found that every element had been established beyond a reasonable doubt. . . . The trial court made it clear that the burden was on the State to prove every element of the crimes charged beyond a reasonable doubt, and the jury was not led to believe that the defendant had to prove anything in order to be found not guilty. *Because the trial court's charge afforded the defendant the same benefits a formal charge on alibi would have afforded, the defendant was not prejudiced by the trial court's error.*

Id. at 617-18, 422 S.E.2d at 682 (citation omitted) (emphasis added).

In the present case, as in *Hood*, the trial court instructed the jury that Defendant was not required to prove his innocence, that Defendant was presumed innocent, and that the State needed to prove beyond a reasonable doubt that Defendant was the perpetrator of the charged offenses. The trial court then instructed the jury as to each element that the State was required to prove beyond a reasonable doubt for each of the charged offenses. The trial court reiterated in its outlining of these elements that, if the jury did not find these elements or have a reasonable doubt about them, then they should find Defendant not guilty.

Even assuming Defendant's trial counsel's performance was deficient, Defendant has not shown that the deficient performance likely affected the jury's verdict. The alibi evidence was presented to the jury at trial. The trial court correctly instructed the jury that Defendant was presumed to be innocent, and that the burden was on the State to prove every element of every crime beyond a reasonable doubt. Because "the trial court's charge afforded [D]efendant the same benefits a formal

charge on alibi would have afforded, [Defendant] was not prejudiced" by the absence of the alibi jury instruction. *Hood*, 332 N.C. at 617-18, 422 S.E.2d at 682. Therefore, Defendant has not shown he was afforded ineffective assistance of counsel.

B. Prior Record Level Determination

[2] Defendant argues the trial court erred in sentencing him as a Prior Record Level VI offender where, due to a miscalculation, the court incorrectly found that Defendant had 18 prior conviction points. "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.*

In sentencing a defendant, a trial court must "determine the prior record level for the offender pursuant to [N.C. Gen. Stat. §] 15A-1340.14" before imposing a sentence. N.C. Gen. Stat. § 15A-1340.13(b) (2015). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14(a) (2015). Convictions "used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2015). Prior convictions may be proven, as relevant here, by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f) (2015).

In the present case, the trial court calculated the sum of the points assigned to each of Defendant's prior convictions and, excluding those convictions used as predicates for Defendant's habitual felon status, determined Defendant had earned 18 prior record level points. Defendant is correct that the trial court committed an arithmetic error in "calculating the sum of the points assigned to each of" Defendant's prior convictions. The trial court assessed 8 points for two "Prior Felony Class E or F or G Conviction[s]," 2 points for one "Prior Felony Class H or I Conviction," 6 points for six "Prior Class A1 or 1 Misdemeanor Conviction[s]," and 1 point for "all the elements of the present offense" being included in "any prior offense." Despite these numbers totaling 17 points, the trial court found the total to be 18.[3] This mathematical

3. We note that Defendant stipulated to the total number of points, 18, and to his prior record level, VI. However, a trial court's assignment of an incorrect record level is "an improper conclusion of law, which we review *de novo*." *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate."

error lead the trial court to sentence Defendant as a Prior Record Level VI offender, as opposed to a Prior Record Level V offender.

The State concedes the mathematical error in Defendant's prior record level calculation, but argues the error was harmless. *See State v. Lindsay*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007) ("This Court applies a harmless error analysis to improper calculations of prior record level points." (citations omitted)). Our precedent compels us to agree. "[T]his Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level." *State v. Ballard*, ___ N.C. App. ___, ___, 781 S.E.2d 75, 79 (2015), *disc. review denied*, 368 N.C. 763, 782 S.E.2d 514 (2016) (citing *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005)); *see also State v. Rexach*, ___ N.C. App. ___, 772 S.E.2d 13, 2015 WL 1201250, at *2 (2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level.").

The presumptive range of minimum sentences for a Prior Record Level V offender convicted of a Class C felony is between 101 and 127 months' imprisonment, and the presumptive range of minimum sentences for a Prior Record Level VI offender convicted of a Class C felony is between 117 and 146 months' imprisonment. *See* N.C.G.S. § 15A-1340.17(c). In the present case, Defendant was sentenced to a minimum of 117 months' imprisonment, which is within the presumptive range of minimum sentences for both a Prior Record Level V and VI offender. Therefore the trial court's error, if present, was harmless. *Ballard*, ___ N.C. App. at ___, 781 S.E.2d at 79.

C. Attorney's and Appointment Fees

[3] Defendant argues the civil judgment imposing fees against him should be vacated because neither Defendant's counsel's total attorney fee amount nor the appointment fee were discussed in open court with Defendant or in his presence. We agree. In *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306 (2005), this Court held that where there is "no indication in the record that [a] defendant was notified of and given an

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State v. Prevette, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (citation omitted), *disc. review denied and appeal dismissed*, 297 N.C. 179, 254 S.E.2d 38 (1979). Therefore, Defendant's stipulation of his prior record level "does not preclude our *de novo* appellate review of the trial court's calculation of [D]efendant's prior record level[.]" *State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009)

opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed," the imposition of attorney's fees must be vacated, even when "the transcript reveals that attorney's fees were discussed following defendant's conviction." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317.

Following Defendant's conviction and sentencing in the present case, the trial court simply stated that Defendant was to be taxed, "with the costs of court and attorney fees, if applicable, if [Defendant's counsel was] court appointed." Defendant's counsel confirmed he was court appointed, and the trial court responded that the counsel fees were to be "m[ade] . . . a civil judgment." The total hours and amount of attorney's fees imposed – 52 and $3,640.00, respectively – were not known at the time of the sentencing hearing, as Defendant's counsel had not yet calculated the number of hours he had worked. Because there is no indication in the record that Defendant "was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed," the imposition of attorney's fees must be vacated. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.*

Defendant was also ordered to pay a $60.00 appointment fee, in accordance with N.C. Gen. Stat. § 7A-455.1 (2015). As with the attorney's fees, the appointment fee was never discussed with Defendant in open court. Our Supreme Court has held that "[c]osts are imposed only at sentencing, so any convicted indigent defendant is given notice of the appointment fee at the sentencing hearing and is also given an opportunity to be heard and object to the imposition of this cost." *State v. Webb*, 358 N.C. 92, 101-02, 591 S.E.2d 505, 513 (2004). Because Defendant was not given notice of the appointment fee and an opportunity to object to the imposition of the fee at his sentencing hearing, the appointment fee is also vacated without prejudice to the State again seeking appointment fee on remand. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317; *see also State v. Mosteller*, ___ N.C. App. ___, 790 S.E.2d 753, 2016 N.C. App. LEXIS 697, at *9-10 (vacating the imposition of appointment fee "without prejudice to the State's right to seek the imposition of . . . [the] appointment fee" on remand, "provided that the defendant is given notice and an opportunity to be heard").

III. Conclusion

For the reasons stated, Defendant did not receive ineffective assistance of trial counsel from his counsel's failure to give timely notice of an alibi defense, and any error in Defendant's prior record level calculation was harmless under precedents of this Court. However, we vacate the trial court's award of attorney's fees and appointment fee, without prejudice to the State's ability to again seek them on remand.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
AHMAD JAMIL NICHOLSON, Defendant

No. COA17-28

Filed 19 September 2017

1. Search and Seizure—motion to suppress—traffic stop—lack of reasonable suspicion

The trial court erred in a common law robbery case by denying defendant's motion to suppress evidence obtained by law enforcement officers following an investigatory stop, based on lack of reasonable suspicion. The officers had no evidence of any criminal activity to which they could objectively point, and the series of activities did not provide reasonable suspicion.

2. Search and Seizure—denial of motion to suppress—traffic stop—prejudicial error—fruit of poisonous tree

The trial court's denial of defendant's motion to suppress evidence obtained by law enforcement officers following a traffic stop was prejudicial error where most of the evidence used to support defendant's conviction was derived from an officer's unconstitutional seizure and thus was fruit of the poisonous tree.

Judge MURPHY dissenting.

Appeal by Defendant from judgment entered 13 May 2016 by Judge John O. Craig, III in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

On 4 May 2016, Ahmad Jamil Nicholson ("Defendant") filed a motion to suppress evidence obtained by law enforcement officers following a traffic stop. On 9 May 2016, the trial court orally denied Defendant's motion to suppress.[1] Defendant appeals following a 12 May 2016 verdict convicting him of common law robbery. On appeal, Defendant contends the trial court erred by denying his motion to suppress evidence. We find prejudicial error and grant a new trial for Defendant.

I. Factual and Procedural History

On 14 March 2016, a Forsyth County Grand Jury indicted Defendant for robbery with a dangerous weapon. On 4 May 2016, Defendant filed a written, verified motion to suppress "any and all statements obtained from the defendant" while he was "seized" on the morning of 23 December 2015. On 9 May 2016, the Forsyth County Superior Court called Defendant's case for trial. After addressing other pretrial motions (not in contention on appeal), the trial court heard Defendant's motion to suppress.

In opposition to the motion, the State called Lieutenant Damien Marotz, the arresting officer. Around 4:00 a.m., on 23 December 2015, Lt. Marotz drove west down West Mountain Street in Kernersville, North Carolina. As he approached the intersection of West Mountain Street and West Bodenhamer Street, he noticed a car parked in the road, facing east, just past the Petro 66 gas station. "It was just sitting there in the turn lane, with its headlights on and no turn signals . . . ." There were no reports of criminal activity in the area that morning.[2]

1. We note, the trial court suggested a written order would be prepared by Mr. Matthew H. Breeding, counsel for the State, but no written order is included in the record.

2. Lt. Marotz did not specify how he knew there were no reports of criminal activity, but testified there were no reports and confirmed he was conducting a "routine" patrol.

As Lt. Marotz drove towards the stationary car, he saw two African American men inside the car; one man sat in the driver's seat, and the other passenger sat directly behind the driver, with the front passenger seat empty. Lt. Marotz later identified the passenger as Defendant. Although it was "in the 40s" and "misting rain[,]" both windows on the driver's side of the car were down. Defendant began to pull down "a toboggan-style mask of some kind" to approximately "the bridge of [his] nose[,]" but "pushed it back up" as Lt. Marotz pulled up next to the car. However, Lt. Marotz did not know if the garment actually had eyeholes.

Lt. Marotz rolled his window down and asked both men if everything was okay. Both men confirmed everything was okay, and the driver, Quentin Chavis, explained "[Defendant] was his brother and . . . they had gotten into an argument and that everything was okay now, that they were not arguing anymore." Defendant agreed, stating, "Yes, Officer, everything's fine."

Lt. Marotz "did not observe a sign of struggle" between the men. However, "something just didn't seem quite right." He asked, again, if the men were sure everything was okay. Both men "[shook] their head[s] and agree[d]" everything was okay. Lt. Marotz noticed Chavis "move [ ] his hand up . . . scratching" or "making a motion with his hand[.]" Lt. Marotz specifically recalled this action because he "kept watching everybody's hands to make sure they didn't have any weapons." Lt. Marotz inquired, again, if they needed any help, and the men continued to confirm "everything was fine."

Lt. Marotz drove into the gas station parking lot. He decided to continue watching the car because he "felt like something wasn't quite right" and he "wanted to make sure that they didn't continue to argue[.]" Approximately thirty seconds elapsed, and the car did not move. Lt. Marotz decided to speak with the men again and got out of his car to walk over to them. Lt. Marotz "thought it was odd that they were just still sitting in the middle of the road." Lt. Marotz activated his body-worn camera[3] and called for backup.

As Lt. Marotz walked towards the car, Defendant got out of the backseat. Chavis pulled the car forward approximately two feet and stopped. Lt. Marotz called out to Chavis, "Hey. Where are you going? Are you going to leave your brother just out here?" Chavis replied he was late and needed to get to work.

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3. Lt. Marotz's body-worn camera did not activate the first time he attempted to turn it on. He had to hit it two additional times before it activated.

Again, Lt. Marotz inquired if everything was okay. Initially, both men continued to confirm everything was okay. However, the second time Lt. Marotz inquired, Chavis shook his head, as if to indicate "No." But Defendant continued to say, "No, Officer. Everything is fine." Lt. Marotz responded, "Well, your brother here in the driver's seat is shaking his head. He's telling me everything's not fine. Is everything fine or not? Is everything good?" Chavis interrupted Lt. Marotz and stated, "No, Officer, everything's fine. I've just got to get to work." Chavis explained he worked at FedEx. Lt. Marotz described Chavis as "hurried" and "just ready to go[,]" noting he "edged the vehicle forward a couple of feet[.]" After Defendant confirmed again everything was okay, Lt. Marotz told the driver, "Okay. Go to work." Lt. Marotz explained "if I wanted to continue the investigation, I could have went [to FedEx]" to speak with Chavis. However, Lt. Marotz did not know the identity of the driver at this time.

Defendant continued to "st[and] there[,]" but stated he was going to go to the store. Lt. Marotz responded, "Hang on a minute . . . . Do you have any weapons on you?" Lt. Marotz confirmed this was a command, and Defendant was thereafter "detained." He wanted to make sure he was not being followed "with any sort of weapon" and it was not unusual for him to ask such a question, given the darkness and early morning hour. Defendant told Lt. Marotz he had a knife. Defendant explained "he normally carries a knife because he wants to make sure he doesn't get robbed." Lt. Marotz asked Defendant where the knife was, but advised him not to reach for it. Despite Lt. Marotz's instruction, Defendant moved "his hand into his left pants pocket." At that point, Lt. Marotz drew his firearm, but kept it lowered by his side.

Officers Oriana and Feldman arrived on the scene. Defendant removed his hand from his pocket and stated, "Just don't shoot me." Lt. Marotz asked Defendant several times to put his hands on his head and to step out of the road to avoid approaching traffic before he complied. Defendant appeared confused and "slow . . . to listen to . . . instructions and . . . commands." Defendant asked several times, "What am I doing?" Defendant also had "a moderate odor of alcohol on his person, and his speech was slurred."

One of the backup officers asked Defendant where the knife was. Defendant responded, "It's in my waistband" and began to reach for it. Lt. Marotz and the backup officers told Defendant to put his hands back on top of his head. Defendant complied. Officer Feldman performed a pat-down, but he could not locate a knife. Throughout the process, Defendant attempted to lower his hands repeatedly, and officers advised

him multiple times to keep his hands on the top of his head. Officer Feldman performed a second pat-down, but he still could not find a knife on Defendant. Lt. Marotz told Defendant they could not locate a knife. Defendant replied, "he didn't have the knife on him, that he used to carry this knife but that sometimes he carries a knife."

Then, Lt. Marotz asked Defendant for his identification.[4] Officer Feldman provided Defendant's information over the radio. Lt. Marotz continued to question Defendant about "what was going on with him and his brother" because he "wanted to make sure that there wasn't any problems and that he wasn't injured, [and] his brother wasn't injured . . . because something did not seem quite right." When asked why he continued to question Defendant when "[he] had no evidence of any criminal activity that [he] was able to objectively point to[,]" Lt. Marotz answered he "wanted to make sure that both [Defendant] and also [Chavis] were safe and that nothing had happened to either one of them."

Officer Oriana also asked Defendant where he lived. Defendant did not answer the question and instead asked several times whether Officer Oriana was going to give him a ride home. Defendant became "angry" and "aggressive." Lt. Marotz instructed Officer Oriana not to give Defendant a ride home because Defendant appeared to be "impaired."

Defendant also made several other statements, including he was late for work and his brother had let him borrow the car so he could go to work. However, Defendant refused to say where he worked, and Defendant's statement regarding borrowing the car "didn't make any sense because [Chavis] was driving the vehicle."

After determining there were no active warrants against Defendant, Lt. Marotz told Defendant, "You're free to go." Defendant told officers he was going to the store. However, he remained with Lt. Marotz and the two officers for approximately another thirty seconds. He asked for a cigarette and a lighter, but they did not have any. Defendant started heading towards the store, but one of the officers informed Lt. Marotz the store was closed. Lt. Marotz called out to Defendant, "I'm sorry, sir. I didn't realize the store is closed." The entire encounter lasted approximately eight to ten minutes.

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4. Based on Lt. Marotz's testimony during the motion to suppress hearing, we are unable to ascertain exactly how Defendant's identification was produced. Lt. Marotz's testimony during trial provided further clarification. It appears Officer Feldman removed Defendant's wallet from Defendant's pocket and Defendant "reached over and grabbed the ID -- or the wallet out of the officer's hand and says, 'I can give you my ID.'"

Lt. Marotz confirmed his body-worn camera recorded the entire encounter, and the video footage "fairly and accurately" depicted the interaction. The defense "stipulate[d] for [the] hearing [the video was] admissible to play." The trial court viewed the video.

Following arguments from the defense, the trial court denied Defendant's motion to suppress. The trial court reconvened on 10 May 2016 and proceeded to trial.

The State first called Chavis to testify.[5] On 23 December 2015, at around 3:00 a.m., Chavis woke up for work. Around 3:40 a.m., he drove out of his parents' neighborhood, towards the intersection of Westlo Drive and Mountain Street. There, he saw Defendant waving at him. Chavis did not know Defendant. However, he stopped because he thought Defendant might need help. Defendant asked for a ride to a nearby gas station. Chavis told Defendant he could not give him a ride because he was going to be late for work. Defendant then asked for a "blunt[,]" and Chavis told him he did not have one. When Defendant again asked for a ride, Chavis again refused.

Then, Defendant "just got in the car" and said, "I'll just sit in the back." Chavis decided to give Defendant a ride to the gas station because he believed "[Defendant was] not going to get out because he really need[ed] a ride" and "it was raining . . . ." Defendant told Chavis, "I see you're living good" and he liked his shoes that were in a bag. Defendant explained that his phone died and he just needed a ride.

The two arrived "in front of the Petro 66 gas station[.]" Chavis said, "Here you go, man. Can you just get out because I'm late for work." At that point, Defendant placed a knife against Chavis's neck and said, "Well, let's just make this easy. Give me everything you have, any money you have." Chavis told Defendant he did not have any cash. Defendant ordered Chavis to give him his credit card. Chavis gave Defendant his State Employees' Credit Union savings card. Defendant asked for Chavis's pin number, and Chavis told him a fake number. Defendant then said he would not be able to remember the number and told Chavis to write it down. Defendant rummaged through the middle console and found a pen and paper to write on. Defendant wrote the pin down.[6]

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5. The State also called the following witnesses: (1) Bobby Chavis, Quentin Chavis's father; (2) Sergeant Dan Wemyss, who administered the photographic lineup; and (3) Detective Alan Cox, who interviewed Quentin Chavis.

6. In his initial testimony and his written statement to police, Chavis said he wrote the pin down, not Defendant.

Defendant leaned forward and warned Chavis not to cancel the card. Chavis confirmed he would not. During this time, Chavis felt "nervous and scared[,]" but explained he "was always taught" not to show any fear "because when you show fear, that's when -- that's when it makes it easier for the person."

Defendant moved the knife "as if he was going to stab [Chavis.]" Defendant said, "he had nothing to lose" and he "didn't have a problem sticking [Chavis.]" At that point, Chavis noticed a car approaching. Defendant "tried to pull his toboggan over his face[.]" Lt. Marotz pulled up beside the car in the opposite lane. Chavis spoke with Lt. Marotz, but he did not tell the officer what was going on because he "didn't know what the defendant was going to do[,]" or whether "he still had a knife on him[,]" and "[t]here was only one officer."[7] However, Chavis attempted to signal to Lt. Marotz "to show him that everything wasn't okay" by "winking real hard . . . to see if he could identify I was trying to wink at him on purpose[.]" He also made a "cut throat" gesture.

Chavis called his mother and told her and his father about the incident. Then he went to work, arriving at around 4:15 a.m. Chavis returned home around 6:30 a.m. and then went to the police station with his father.

Upon arriving at the police station at approximately 7:00 or 7:15 a.m., Chavis conveyed the same story and provided a written statement. Chavis identified Defendant as the person who robbed him, from a photographic lineup[8] containing seven[9] photos.[10] An officer searched Chavis's car and found a knife[11] in the backseat, behind the passenger seat.[12] After returning home, Chavis began to clean out his car and found

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7. Chavis testified, "[Defendant] still had the knife to my neck." We note, although Lt. Marotz testified he was trying to keep an eye on everyone's hands, he could not actually see Defendant's hands, and only knew they were down, and he did not see a knife. He did note, "It was dark out."

8. Chavis also identified Defendant as the man who robbed him during his testimony.

9. Chavis's testimony conflicts with Officer J.D. Serrin's as to whether there were seven or eight photos in the lineup.

10. Chavis first chose the first photo, but considered the sixth photo. After determining the man in the sixth photo was too large to be his robber, he ultimately chose the first photo, Defendant's photo.

11. The trial court admitted the knife into evidence, and it was shown to the jury.

12. Chavis rode to the police station with his father, in his father's car. Initially, the officer told Chavis he would go to Chavis's house to search Chavis's car. However, officers later instructed Chavis to return to the police station. He returned to the station with his car around 8:00 a.m., approximately thirty minutes after he originally left.

his bank card in an "envelope that [ ] had [his] pay stub from Fedex[.]"[13] Chavis called police to notify them "[Defendant] didn't take the card. He just left the card."

Lt. Marotz also testified, providing largely the same information regarding his encounter with Defendant as he did during the motion to suppress hearing.[14] The State published the footage from Lt. Marotz's body-worn camera to the jury.

The State called Officer Serrin. Officer Serrin largely confirmed Chavis's testimony regarding their interaction at the police station. He provided additional details regarding the knife he seized from Chavis's car, describing it as a "steak knife." He specifically recalled, "It had a logo on it, the J. A. Henckels logo on it. I recognized it because that's the same brand of knife that I have."

After obtaining a warrant for Defendant's arrest, Officer Serrin and several other officers went to Defendant's home and obtained permission to search the home.[15] Officer Serrin found a J.A. Henckels knife block in the kitchen.[16] "[T]he block [had] two sections. It had one section for steak knives, and above that was a section for other cooking knives." A single steak knife was missing. "[He] pulled out one of the steak knives out of the block, and it looked identical to the knife [he] found in [Chavis's] car." When asked, Officer Serrin admitted the knife seized from Chavis's car looked much older than the pictures of the knives in the block, but believed "the latent print dust" contributed to this appearance. He did not seize the knife block because "it wasn't evidence of a crime. It was what [he] compared evidence to." The State published pictures of the knife set to the jury.

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13. Chavis explained he keeps his old pay stubs in his car, and the pay stub in the envelope in his card "was an older pay stub."

14. Defendant requested a line objection with respect to evidence obtained from the encounter with Defendant after Lt. Marotz "seized" him, thus preserving the issue of admissibility for appeal. *State v. Randolph*, 224 N.C. App. 521, 528, 735 S.E.2d 845, 851 (2012) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)) ("[A] trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.").

15. Defendant's mother, and owner of the home, gave consent.

16. Defendant moved *in limine* to "prohibit[ ] the State or any of its witnesses, from stating in the presence of the jury any information relating to an allegedly matching set of steak knives missing one which matched the knife recovered from the back of the complaining witness' car" because police failed to seize the set of knives. The court denied Defendant's motion, and Defendant does not raise this issue on appeal. Because this issue is not raised on appeal, we do not address it. N.C. R. App. P. 28(a) (2016) ("The scope of

The State rested.[17] Defendant offered no evidence on his behalf. On 12 May 2016, the jury found Defendant guilty of common law robbery. The trial court sentenced Defendant to a suspended sentence of ten to twenty-one months. On 13 May 2016, Defendant gave timely oral and written notice of appeal.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"[A]n error under the United States Constitution will be held harmless if 'the jury verdict would have been the same absent the error.' " *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (quoting *Neder v. United States*, 527 U.S. 1, 17, 144 L. Ed. 2d 35, 52 (1999)). "[T]he government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error." *Id.* at 513, 723 S.E.2d at 331 (citations omitted).

III. Analysis

We review Defendant's contentions in two parts: (A) whether Lt. Marotz possessed reasonable suspicion to seize Defendant; and (B) whether the trial court's denial of Defendant's motion to suppress resulted in reversible error.

A. Reasonable Suspicion

[1] On appeal, Defendant contends the trial court erred in denying his motion to suppress. Specifically, Defendant argues Lt. Marotz lacked reasonable suspicion, and, accordingly, Defendant was "seized" in violation of his Fourth Amendment rights. We agree.

The Fourth Amendment protects "against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Fourth Amendment protections

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review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

17. As noted *supra* in footnote 5, the State called several other witnesses whose testimonies are not included in this discussion.

are "applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961)). The North Carolina Constitution also affords individuals similar protections. *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing N.C. Const. art. I, § 20).

Under the Fourth Amendment, a "seizure" occurs when a police officer "restrains [an individual's] freedom to walk away[.]" *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). Thus, Fourth Amendment protections are applicable to "police conduct [even] if the officers stop short of . . . a 'technical arrest[.]' " *Id.* at 19, 20 L. Ed. 2d at 904; *Watkins*, 337 N.C. at 441, 446 S.E.2d at 69-70 (applying Fourth Amendment protections to a "brief" investigatory detention).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "[D]ue weight must be given not to [an officer's] inchoate and unparticularized suspicion or 'hunch.' " *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909 (citation omitted). Rather, reasonable suspicion must be based on "rational inferences" drawn from "specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). "[T]he totality of the circumstances—the whole picture—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). "[W]holly lawful conduct [may in certain circumstances] justify the suspicion that criminal activity was afoot." *United States v. Sokolow*, 490 U.S. 1, 9 104 L. Ed. 2d 1, 11-12 (1989) (citation omitted).

"In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39, 136 L. Ed. 2d 347, 354 (1996). However, "courts have recognized factors such as activity at an 'unusual hour[,]' and 'an area's disposition toward criminal activity' as articulable circumstances which may be considered along with more particularized factors to support reasonable suspicion[.]" *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000) (citations omitted). "Conflicting statements", *State v. Johnson*, ___ N.C. App. ___, ___, 783 S.E.2d 758, 762-63 (2016) (citing *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005)), as well as a vehicle "stopped in a lane of traffic

on the road way" have also provided basis for reasonable suspicion. *State v. Evans*, ___ N.C. App. ___, ___, 795 S.E.2d 444, 454-56 (2017) (holding reasonable suspicion supported by: "(1) defendant['s vehicle] stopped . . . in a lane of traffic on the roadway; (2) . . . an unknown pedestrian approach[ing] the car and lean[ing] in the window; and (3) th[e] incident occur[ing] at 4:00 a.m. in an area known . . . to be a location where drug sales frequently took place").[18]

At the outset we note, the trial court denied Defendant's motion to suppress orally.

> If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.

State v. Wainwright, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal citations and quotation marks omitted).

For the motion to suppress, only Lt. Marotz testified. Defendant declined the opportunity to present any evidence. Additionally, Defendant does not argue any material conflicts with Lt. Marotz's testimony. Thus, "[t]he record is sufficient to permit appellate review of the [oral] denial of [D]efendant's motion to suppress." *Id.* at 83, 770 S.E.2d at 104.

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18. We note both the State and Defendant cite *State v. Roberts*, 142 N.C. App. 424, 542 S.E.2d 703 (2001). However, *Roberts* is no longer binding precedent. The North Carolina Supreme Court allowed the Attorney General's motion "to vacate judgment of Court of Appeals[.]" *State v. Roberts*, 353 N.C. 733, 551 S.E.2d 851 (2001). Defendant argues because the Supreme Court only vacated the judgment, not the opinion, *Roberts* is still binding precedent. Our research shows Roberts passed away while imprisoned on 10 January 2001. *See* North Carolina Department of Public Safety Offender Public Information, (http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0346619&searchLastName=roberts&searchFirstName=James&searchMiddleName=d&listurl=pagelistoffendersearchresults&listpage=1) (last visited August 9, 2017). "Under North Carolina Rule of Evidence 201, we take judicial notice of this fact from the Department of Public Safety website's offender search results." *State v. Harwood*, ___ N.C. App. ___, ___ n.2, 777 S.E.2d 116, 118 (2015) (citations omitted). Because Roberts passed away before this Court filed its opinion, and thus before his conviction was final, the entire prosecution is abated *ab initio*. *See State v. Dixon*, 265 N.C. 561, 561-62, 144 S.E.2d 622, 622-23 (1965).

Defendant does not challenge the constitutionality of his initial interaction with Lt. Marotz, but rather the point at which Lt. Marotz stopped Defendant from going to the store. Lt. Marotz acknowledged Defendant was from that point forward, "detained," and the State does not contest this on appeal.[19] We therefore assume, without deciding, Defendant was from that point forward "seized" until Lt. Marotz told him he was free to leave.

We turn to whether Lt. Marotz possessed reasonable suspicion to seize Defendant. We begin with Lt. Marotz's cross examination:

> Q. And you, at that point, had no evidence of any criminal activity that you were able to objectively point to. Correct?
>
> A. No. That's why I was continuing to investigate.
>
> Q. So you were looking to see if you could find anything, but you hadn't yet seen anything?
>
> A. That's correct. I wanted to make sure that both your client and also the alleged victim were safe and that nothing had happened to either one of them.

State v. Murray, 192 N.C. App. 684, 666 S.E.2d 205 (2008) provides relevant guidance. In *Murray*, the law enforcement officer similarly testified, "he had no reason to believe that Defendant was engaged in any unlawful activity at the time of the stop." *Id.* at 684, 666 S.E.2d at 206. Despite the reference to facts that "were general to the area, namely, the 'break-ins of property at Motorsports Industrial Park . . . the businesses were closed . . . no residences were located there . . . [and it] was in the early hours of the morning,' " this Court concluded the officer did not have a basis for reasonable suspicion. *Id.* at 689, 666 S.E.2d at 208-09. The Court reasoned, "[the officer] never articulated any *specific facts* about the vehicle itself to justify the stop . . . " and "[t]o hold otherwise would make any individual in the Motorsports Industrial Park 'subject to arbitrary invasions solely at the unfettered discretion of officers in the field.' " *Id.* at 689-90, 666 S.E.2d at 208-09 (emphasis added) (citation omitted).

Here, Lt. Marotz similarly confirmed he had no evidence of any criminal activity to which he could objectively point. However, unlike

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19. The State does note in passing, perhaps it was not a "seizure" because Defendant remained with police even after he was told he was free to leave.

Murray which relied solely on facts "general to the area," Lt. Marotz pointed to Defendant's toboggan, stating, "[t]he only thing I saw with [Defendant] was the -- what I was concerned about was the -- when he was pulling the toboggan down over his head. I wasn't sure exactly what was going on at that point." Notably, although Lt. Marotz initially suggested the garment appeared to be "a toboggan-style mask . . . the [kind] with the holes in the eyes[,]" Lt. Marotz confirmed he did not know whether the toboggan actually had any eyeholes.

The State points to several factors in support of its argument for reasonable suspicion, including: (1) the unoccupied front passenger seat—despite there being two occupants in the car—with Defendant seated in the backseat, directly behind Chavis; (2) the car's stationary position "in the middle of the road"; (3) Lt. Marotz's knowledge that Defendant and Chavis had just been engaged in "a heated argument"; (4) the inconsistent answers provided by Chavis when asked whether everything was okay; and (5) the early morning hour. However, unlike the "totality of the circumstances" present in *Evans*, the circumstances present here do not logically lead to the same conclusions. *See Evans*, ___ N.C. App. at ___, 795 S.E.2d at 454-56. This is especially true in light of the fact Lt. Marotz already questioned both Defendant and Chavis twice and subsequently released Chavis so he could go to work after he assessed the situation and concluded "[i]t was a heated argument between two brothers."

Moreover, when asked why he seized Defendant and inquired whether Defendant was armed, Lt. Marotz stated, "Well, it's just a common thing that I ask everybody that's out at 4:00 A.M. in the morning, in the dark. And if you're -- I just want to make sure that if I'm coming out with you, you don't -- you're not following me with any sort of weapon." Such basis for a "seizure" would have made "any individual in the [area] subject to arbitrary invasions" as was contemplated in *Murray*. *Murray*, 192 N.C. App. at 689-90, 666 S.E.2d at 208-09 (emphasis added) (citation and quotation marks omitted).

" '[A] series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together' " can in certain circumstances "warrant[ ] further investigation." *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12 (citation and quotation marks omitted). However, the acts present here, when taken together do not provide a basis for reasonable suspicion. Accordingly, we conclude Lt. Marotz lacked reasonable suspicion to stop Defendant, and the trial court erred in denying Defendant's motion to suppress.

B. Prejudicial Error

[2] Defendant also contends the trial court's denial of his motion to suppress resulted in reversible error. We agree.

> Some constitutional errors in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction . . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. In deciding what constituted harmless error . . . the [United States Supreme] Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

State v. Johnson, 29 N.C. App. 534, 537-38, 225 S.E.2d 113, 115-16 (1976) (citation and quotation marks omitted) (first alteration in original). If other "overwhelming evidence" supports the conviction beyond a reasonable doubt, the erroneous admission of the contested evidence is harmless error. *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (citations omitted) (holding erroneous admission of evidence was harmless due to the "overwhelming evidence of defendant's guilt" as established by the positive identification of defendant by various witnesses and defendant's presence at the crime scene). We must, therefore, determine whether the evidence, excluding "any and all statements obtained from the defendant as a result of the unlawful seizure and detention of the defendant[,]" supports Defendant's conviction of common law robbery. We note this only excludes the statements from Defendant during the time Lt. Marotz stopped him from going to the store and when officers conducted two pat-downs.

"Common law robbery 'is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.' " *State v. Carter*, 186 N.C. App. 259, 262, 650 S.E.2d 650, 653 (2007) (quoting *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961)). " 'It is not necessary to prove both violence and putting in fear-proof of *either* is sufficient.' " *Id.* at 262, 650 S.E.2d at 653 (quoting *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547 (1971)).

Here, much of the evidence used to support Defendant's conviction was derived from Lt. Marotz's unconstitutional seizure; thus, it was fruit

of the poisonous tree and should be suppressed. Fourth Amendment protections are enforced through the "exclusionary rule." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Under the exclusionary rule "evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *Id.* Additionally, the "fruit of the poisonous tree doctrine," provides "when evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113–14, 423 S.E.2d 740, 744 (1992).

Defendant's conviction is supported by the following: (1) Chavis's testimony regarding the robbery; (2) Chavis's positive identification of Defendant from a photographic lineup; (3) Chavis identifying Defendant as the robber in court; (4) the steak knife found in Chavis's car; and (5) the block of knives found in Defendant's residence, missing one steak knife and bearing a striking resemblance to the steak knife seized from Chavis's car.

Had Lt. Marotz not seized Defendant, he would not have obtained Defendant's identification.[20] Therefore Chavis' subsequent identification of Defendant both in a photograph line-up and in open court would not have occurred. Additionally, while Defendant was unlawfully seized he disclosed his habit of often carrying a knife on his person. This information led to the seizure of the knife from Chavis's car, and the subsequent search of Defendant's home which revealed the block of knifes. Because evidence that would not be discoverable but for the unconstitutional seizure must be suppressed, *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872, this evidence should have been suppressed. We, therefore, conclude the evidence admitted from Defendant's unlawful seizure resulted in prejudicial error.

IV. Conclusion

For the foregoing reasons, we conclude Defendant's seizure violated his Fourth Amendment rights. Lt. Marotz lacked reasonable suspicion for the investigatory stop of Defendant. Additionally, the trial court's

20. The record does not suggest the State would have been able to independently link the unknown suspect directly to Defendant, or obtain the evidence resulting from knowledge of Defendant's name.

denial of Defendant's motion to suppress was prejudicial error entitling Defendant to a new trial.

NEW TRIAL.

Judge DAVIS concurs.

Judge MURPHY dissents in a separate opinion.

Murphy, Judge, dissenting.

I accept the facts portion as set out by the Majority, however, the facts demonstrate that there was a reasonably articulable suspicion that criminal activity was afoot when Lt. Marotz seized Defendant. Therefore, I respectfully dissent from the Majority's holding that the trial court erred by denying Defendant's motion to suppress.

On appeal, Defendant argues, and the Majority agrees, that the trial court erred by denying Defendant's motion to suppress because Lt. Marotz lacked the reasonable suspicion that was required to stop Defendant. I disagree, because Lt. Marotz operated within the bounds of the Fourth Amendment's protections, only seizing Defendant once there was a reasonably articulable suspicion that criminal activity was afoot.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), the United States Supreme Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22, 20 L.Ed.2d at 906-07. This is because "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 617 (1972). Thus, "[a] brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time" so that the officer can "maintain the status quo momentarily" to gather more information. *Id.* at 146, 32 L. Ed. 2d at 617 (citations omitted).

We "consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quotation omitted). "An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* at 441, 446 S.E.2d at 70 (quotation

omitted). These facts must be "specific and articulable[,]" and we also consider "the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 441-42, 446 S.E.2d at 70 (citations omitted). Conduct may "justify the suspicion that criminal activity was afoot[,]" even if, in other circumstances, the conduct would be "wholly lawful." *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989) (quotation omitted). For example, when an activity occurs "at an unusual hour" we have considered it an articulable circumstance that may be considered "along with more particularized factors to support reasonable suspicion[.]" *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000) (quotations and citations omitted).

Whether the requisite reasonable suspicion to stop Defendant existed is a conclusion of law. Thus, I apply the principles set forth above in a de novo determination of whether reasonable suspicion to make an investigatory stop existed, giving "due weight to inferences drawn from the facts by resident judges and local law enforcement officers, and view[ing] the facts through the eyes of a reasonable, cautious officer, guided by his experience and training, in light of the totality of the circumstances." *Id.* at 598, 530 S.E.2d at 302 (quotations and alterations omitted). This analysis assumes the seizure occurred when Lt. Marotz stopped Defendant from going to the store.[1]

At the outset, I emphasize that the objective facts are viewed through the lens of *a reasonable, cautious officer*, not based on Lt. Marotz's subjective analysis of the law. I note this point as the Majority places too much weight on Lt. Marotz's analysis on cross-examination as to whether there was evidence of criminal activity he could point to at the time of seizure. In doing so, the Majority relies on a case where the officer relied on a hunch and "*never articulated any specific facts* about the vehicle itself to justify the stop . . . ." *State v. Murray*, 192 N.C. App. 684, 689, 666 S.E.2d 205, 208 (2008) (emphasis added). In contrast, Lt. Marotz articulated *objective* facts about Defendant, from which a reasonable, cautious officer could infer that an individual is involved in criminal activity.

Lt. Marotz first noticed the vehicle from which Defendant emerged because it was parked in the middle of a turning lane at an unusual hour – 4 a.m. – with windows rolled down, even though there was "misting rain" and the temperature was in the "40s." He also noted the unusual

1. I assume, without deciding, that this was the point at which the seizure occurred for the reasons articulated by the Majority.

seating arrangement of the vehicle's two passengers, where one man sat directly behind the driver, and was "concerned" when Defendant pulled "a toboggan-style mask of some kind" – with what "looked like two cut-outs" – over his head to approximately "the bridge of [his] nose[,]" and then removed it when Lt. Marotz pulled his patrol car up next to the vehicle. When Lt. Marotz asked if the men were okay, they explained they were brothers who "had gotten into an argument[,]" but "that everything was okay now." Based on this answer, Lt. Marotz drove away, but parked at a nearby gas station, and continued watching the vehicle because he felt that something was not right, and wanted "to make sure that they didn't continue to argue[.]" The vehicle remained stationary, which Lt. Marotz thought was "odd[,]" so he decided to speak with them again. He left his patrol car, and walked over to the stationary vehicle.

As he approached, unusual events continued. Defendant got out of the backseat and stood in the middle of the road, and the driver immediately pulled the car forward two feet, then stopped. Lt. Marotz called out to the driver to inquire whether he was just going to leave his brother in the middle of the road, which notably was in the dark at 4 a.m., and no other people were present. The driver claimed he was late for work. In an eerie exchange, Lt. Marotz again asked if everything was okay, and although the men initially confirmed everything was okay, Lt. Marotz asked a second time, and the driver shook his head "no" while saying yes.

When Lt. Marotz told Defendant that the driver had indicated "no," the driver interrupted Lt. Marotz to say everything was fine, appearing "hurried[,]" "edg[ing] the vehicle forward[.]" Lt. Marotz told the driver to go to work, and the driver left. Defendant remained, just standing in the middle of the road. He then stated he was going to the store, which was closed.[2] Lt. Marotz testified that, in response, he told Defendant to "[h]ang on a minute[,]" which he testified was a command, and the point at which Defendant was seized.

In my review, there were objective facts related to the driver's fear and unease, including that he notified Lt. Marotz that he was not okay, while eager to leave Defendant behind. This fear was observed after Defendant had pulled a toboggan over his face as if it were a mask, which

2. Although Lt. Marotz subjectively did not know the store was closed at this point, review of Lt. Marotz's bodycam shows a closed store, and, when two other officers appeared on scene, they were able to observe that the store was closed, as one of the officers told Lt. Marotz it was closed.

are routinely used in crimes.[3] Defendant was then left in the middle of the road at 4 a.m., claiming he was going to a closed store. The totality of these circumstances leading up to this seizure demonstrate there was a reasonably articulable suspicion that criminal activity was afoot when Lt. Marotz seized Defendant and discovered his name and identity. Thus, the Fourth Amendment permitted Lt. Marotz to briefly stop Defendant in an attempt to dispel the suspicion. *See Adams*, 407 U.S. at 146, 32 L. Ed. 2d at 617 ("A brief stop of a suspicious individual, in order to . . . maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). Lt. Marotz rightly ended the encounter once he found no further signs that criminal activity was afoot.

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3. "Toboggan" refers to a "stocking cap." *In re N.J.*, No. COA13-53, 230 N.C. App. 140, 752 S.E.2d 255, 2013 WL 5460091 *1, fn. 2 (N.C. Ct. App. October 1, 2013) (unpublished) (citing Merriam–Webster's Collegiate Dictionary 1313 (11th ed. 2004)).

Our case law demonstrates many crimes are committed while a ski mask is used. *See e.g. State v. Hall*, 165 N.C. App. 658, 664, 599 S.E.2d 104, 107 (2004) ("The robber wore a ski mask[.]"); *State v. Bellamy*, 172 N.C. App. 649, 654, 617 S.E.2d 81, 86 (2005) ("[The robber] wore a green ski mask[.]"); *State v. Taylor*, 80 N.C. App. 500, 502, 342 S.E.2d 539, 540 (1986) ("[The robber] was wearing the ski mask.").

Even if the mask were a toboggan without eye holes, our review is based on the facts available to Lt. Marotz at the time, who could not definitively tell whether there were eye holes, but thought it looked like a mask with cutouts. Moreover, toboggan-style masks are also used to further crime. *See e.g. State v. Hagans*, 177 N.C. App. 17, 18, 628 S.E.2d 776, 778 (2006) ("[The] assailants were . . . dressed in . . . toboggan masks with the areas over the eyes cut out."); *State v. Ford*, 194 N.C. App. 468, 470, 669 S.E.2d 832, 835 (2008) ("[They wore] toboggans over their faces. . . ."); *State v. Stephens*, 175 N.C. App. 328, 331, 623 S.E.2d 610, 612 (2006) (describing how "[a]nother man wearing . . . a black toboggan over his head and face, with home made eye holes cut into it" participated in the robbery).

STATE OF NORTH CAROLINA, PLAINTIFF
v.
CATHY MANGUM SAULS, DEFENDANT

No. COA16-860

Filed 19 September 2017

1. Search and Seizure—vehicle stop—objective justification for stop—motion to suppress evidence—reasonable suspicion

The trial court did not commit plain error in a driving while impaired case by denying defendant's motion to suppress evidence resulting from the stop of her vehicle, including various field sobriety tests, where the evidence together provided an "objective justification" for stopping defendant. The totality of circumstances showed defendant's vehicle was idling in front of a closed business late at night, the business and surrounding properties had experienced several break-ins, and defendant pulled away when the deputy approached her car.

2. Motor Vehicles—driving while impaired—trooper testimony—HGN test—tender as an expert witness unnecessary

The trial court did not commit plain error in a driving while impaired case by allowing a trooper to testify at trial about a horizontal gaze nystagmus (HGN) test he administered on defendant during a stop. It was unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing.

Judge MURPHY concurring in result only.

Appeal by defendant from order entered 5 February 2016 by Judge Thomas H. Lock and judgment entered 4 March 2016 by Judge Robert F. Floyd in Superior Court, Johnston County. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

STROUD, Judge.

Defendant appeals the order denying her motion to suppress based upon her contention that the evidence obtained from the stop of her vehicle should have been suppressed because the deputy lacked reasonable suspicion for the traffic stop and the judgment convicting her of driving while impaired ("DWI") because the trooper involved should not have been allowed to testify on the results of the horizontal gaze nystagmus test ("HGN test") because the State did not formally tender him as an expert witness. We affirm the order and determine there was no error as to the judgment.

I. Background

In January of 2014, a citation was issued against defendant for operating a vehicle while impaired. The case made its way through district court, and in September of 2017 defendant filed a motion in superior court

> for an order suppressing and excluding the evidence seized . . . for the reason that . . . Deputy Thomas Sewell of the Johnston County Sheriff's Department and Trooper M.D. Williams of the State Highway Patrol stopped the defendant in her motor vehicle on January 25, 2014 without reasonable suspicion that defendant had violated a criminal or traffic offense[.]

Defendant sought to suppress the evidence resulting from the stop of her vehicle, including various field sobriety tests. In February of 2016, the trial court denied defendant's motion to suppress. Ultimately, defendant's case went to trial, and the jury convicted her of driving while impaired. The trial court entered judgment, and defendant appeals both the order denying her motion to suppress and the judgment.

II. Motion to Suppress

[1] Defendant first argues that the trial court committed plain error by denying her motion to suppress. Defendant admits that she failed to properly preserve her appeal of her motion to suppress because she failed to object when the evidence was introduced. To be clear, defendant is actually challenging the denial of her motion to suppress as plain error and is *not* challenging the evidence admitted at trial because of the denial. Our Court recently addressed a case in the same posture:

> Here, defendant filed a pretrial motion to suppress evidence of his arrest alleging that there was not sufficient evidence to establish probable cause for his arrest. That motion was decided after an evidentiary hearing and denied. Thereafter, the record is silent as to any further

objection from defendant to the introduction of the same evidence at the trial of this case. Therefore, defendant has waived any objection to the denial of his motion to suppress, and it is not properly preserved for this Court's review. Defendant, however, attempts to cure this defect by arguing that the trial court committed plain error instead.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

The North Carolina Supreme Court has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of the evidence. Under the plain error rule, defendant must establish that a fundamental error occurred at trial and that absent the error, it is probable the jury would have returned a different verdict.

Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are exclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. Williams, ___ N.C. App. ___, ___, 786 S.E.2d 419, 424-25 (2016) (citations quotation marks, and ellipses omitted). Ultimately, this Court concluded that the trial court did not commit plain error in denying the motion to suppress without considering the evidence actually presented at trial because the only issue on appeal was whether the trial court had plainly erred in denying the motion to dismiss to suppress. *See id.* at ___, 786 S.E.2d at 425.

The unchallenged and binding findings of fact, *see id.*, establish:

1. On 24 January 2014, at approximately 1:00 AM, Deputy Thomas Sewell of the Johnston County Sheriff's Office was in uniform and on duty in Johnston County, North Carolina.

2. The time was very late at night, sometime after midnight.

3. The temperature was approximately twelve (12) degrees Fahrenheit with a negative wind chill.

4. Deputy Sewell was on patrol in the area of Don Lee's Store, a gas station and convenience store located on North Carolina Highway 50 in Johnston County, North Carolina.

5. Deputy Sewell was familiar with this area because it was his regular, assigned patrol district.

6. Deputy Sewell knew that Don Lee's Store was closed because he had patrolled the area several times prior to this occasion.

7. There is an automobile repair shop across the road from Don Lee's Store.

8. There are several residential homes in the area of Don Lee's Store.

9. Deputy Sewell had performed several business checks in the area including business checks at both Don Lee's Store and the automobile repair shop across the road from Don Lee's Store.

10. Deputy Sewell had personal knowledge of several break-ins that had occurred at Don Lee's Store prior to 24 January 2014.

11. Deputy Sewell recalled that the area surrounding Don Lee's Store was a "decently high break-in area."

12. While on routine patrol, Deputy Sewell saw the Defendant's vehicle close to the gasoline pumps in the parking lot of Don Lee's Store.

13. The Defendant's vehicle was the only vehicle in the parking lot at that time.

14. Deputy Sewell observed that the Defendant's vehicle's engine was running and that its headlights were on.

. . . .

16. When Deputy Sewell drove into the parking lot, he positioned his patrol vehicle directly behind the Defendant's vehicle.

17. The Defendant's vehicle attempted to leave the scene immediately upon Deputy Sewell's arrival.

18. When Deputy Sewell saw the Defendant's vehicle drive away, he immediately became concerned and felt that something must be wrong.

19. As soon as the vehicle began to move, Deputy Sewell activated his emergency vehicle lighting.

20. The vehicle traveled approximately ten to fifteen feet before it stopped.

21. The Defendant did not exit her vehicle at any time and the Defendant committed no traffic or equipment violations prior to Deputy Sewell initiating the stop.

22. When Deputy Sewell drove into the parking lot of Don Lee's Store, he had no intentions of turning on his emergency vehicle lighting; his only intent was to perform a welfare check on the Defendant's vehicle.

23. When Deputy Sewell drove up behind the Defendant's vehicle, he intended to get out [of] his patrol vehicle, walk to the driver's side window of the vehicle, check on the occupant(s) and ensure each was in good health, verify there were no mechanical problems with the vehicle, and then continue on with his regularly assigned patrol duties for that night.

24. Deputy Sewell did not think about turning on his emergency vehicle lighting until the moment that the Defendant's vehicle began to drive away.

Based upon the binding findings of fact the trial court concluded:

2. The facts of this case and the evidence presented by the State of North Carolina at this hearing are sufficient to establish a reasonable articulable suspicion to justify the investigative traffic stop of the Defendant's vehicle for Driving While Impaired.

3. The investigative traffic stop of the Defendant's vehicle for Driving While Impaired did not constitute any

violation of the Defendant's Constitutional or statutory rights.

4. Under the totality of the circumstances, including the time of day, Deputy Sewell's personal knowledge concerning break-ins at Don Lee's Store, the automobile repair shop across the road from Don Lee's Store, the residential homes in the area (Deputy Sewell's regular patrol district), the manner in which the Defendant's vehicle was stopped (immediately adjacent to and parallel to the highway so that traffic on the highway would have been visible to occupants of the vehicle), and the fact that the Defendant's vehicle attempted to leave the scene immediately upon Deputy Sewell's arrival, Deputy Sewell had a reasonable and articulable suspicion to stop the Defendant's vehicle.

Defendant contends these conclusions of law are not supported by the evidence because the trial court's "findings of fact are insufficient to give rise to anything more than a generalized, inchoate and unparticularized suspicion or hunch that there was" criminal activity. Defendant heavily relies on the finding that the deputy's "only intent was to perform a welfare check on the Defendant's vehicle[,]" and the only reason he actually stopped her vehicle was because she pulled away when he approached which is not enough to validate the stop. While defendant's argument makes logical sense, it simply does not reflect the law as it exists: "[T]he Fourth Amendment does not include a consideration of the officer's subjective intent, and his motive will not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *State v. Icard*, 363 N.C. 303, 318, 677 S.E.2d 822, 832 (2009) (citations and quotation marks omitted); *see also State v. Johnson*, ___ N.C. App. ___, 783 S.E.2d 753 (2016) ("[I]f sufficient objective evidence exists to demonstrate reasonable suspicion, a *Terry* stop is justified regardless of a police officer's subjective intent." (citation and quotation marks omitted).

Our Supreme Court has stated,

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable

> facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citations, quotation marks, brackets, and ellipses omitted). The objective "totality of the circumstances" showed: (1) it was very late at night; (2) defendant's vehicle was idling in front of a closed business; (3) the business and surrounding properties had experienced several break-ins; and (4) defendant pulled away when the deputy approached her car. *Id.* Thus, the evidence together provides an "objective justification" for stopping defendant. *See id.* Therefore, the trial court did not err in denying defendant's motion to suppress.

III. Testimony on HGN Test

[2] Defendant next argues that the trial court committed plain error by allowing the trooper to testify at trial about the HGN test he administered on defendant during the stop. Specifically, defendant argues that the State never formally tendered the trooper as an expert witness under Rule 702 of the North Carolina Rules of Evidence. Again, defendant requests this Court to review for plain error because she failed to preserve the issue for appellate review by objecting to the results of the HGN test at trial.

Rule 702(a1) includes specific provisions for expert witnesses who testify regarding results of HGN tests:

> A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

North Carolina General Statute § 8C-1, Rule 702(a1) (2013).

During the pendency of this appeal, our Supreme Court addressed the specific issue before us: "In this appeal we consider whether North Carolina Rule of Evidence 702(a1) requires a law enforcement officer

to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he may testify to the results of a Horizontal Gaze Nystagmus (HGN) test." *State v. Godwin*, ___ N.C. ___, ___ 800 S.E.2d 47, 48 (2017). The Supreme Court ultimately reversed this Court's decision in *Godwin*, which defendant had relied upon here, to conclude that a law enforcement officer need not explicitly be tendered under Rule 702 to testify to the results of a HGN test. *See id.* at ___, 800 S.E.2d at 54. The Court in *Godwin* reasoned that because the officer had been tendered as an expert regarding his law enforcement knowledge, testified he had completed training on how to administer the HGN test and other follow-up courses, had experience with impaired driving investigations, was found to be reliable upon the trial court's *voir dire*, *and* the defendant's only contention was not that the officer was unqualified to testify as an expert regarding HGN testing but merely that he had to formally be tendered as an expert, the State was correct in asserting that the officer had been implicitly recognized as an expert witness in HGN testing and did not need to be formally tendered as such. *See id.* at ___, 800 S.E.2d at 50-53. This case is controlled by *Godwin*. *Compare id.*, __ N.C. __, 800 S.E.2d 47.

Here, Trooper Williams testified that he had been a trooper with the North Carolina State Highway Patrol since 2004 and that he had training in field sobriety testing, including the HGN test. Trooper Williams specifically testified about his training and qualifications to administer the HGN test, including refresher courses in standardized field sobriety testing every year. Over his career, Trooper Williams had participated in hundreds of DWI investigations. During *voir dire*, defendant's counsel agreed "[t]he evidence rule says that he can certainly talk about the HGN if he has been trained in HGN, but I'm – my objection is that this – the trooper's not qualified to testify about the medical effect of pupil dilation or the medical effect of these drugs."[1] This portion of the transcript along with defendant's brief parallels *Godwin*, since the defendant was not arguing the officer was not qualified to testify as an HGN testing expert, but only that he had to be formally tendered as such. *See id.* at __, 800 S.E.2d at 52. Defendant does not argue that Trooper Williams was not properly trained and qualified to testify regarding HGN testing, and the evidence shows he "ha[d] successfully completed training in HGN." N.C. Gen. Stat. § 8C-1, Rule 702(a1). Under *Godwin*, it was simply unnecessary for the State to make a formal tender of the trooper as

1. Based upon the *voir dire*, the trial court sustained defendant's objection to Trooper Williams's testimony regarding defendant's possible impairment by drugs other than alcohol.

an expert on HGN testing, and the trial court committed no error, much less plain error, in allowing the testimony. *See id.*

IV. Conclusion

We conclude defendant received a fair trial, free from reversible error.

AFFIRM AND NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 SEPTEMBER 2017)

EDWARDS v. RICHARDSON No. 16-1178	Union (15CVS2821)	Affirmed
FOWLER v. FOWLER No. 17-178	Buncombe (16CVS253)	Dismissed
IN RE A.J.B. No. 17-379	Mecklenburg (16JA346)	Vacated.
IN RE A.L.G. No. 17-203	Stokes (15JT42-44)	Affirmed
IN RE A.P. No. 17-291	Johnston (14JA192)	Vacated and Remanded
IN RE C.S.H. No. 17-360	Johnston (16JT93)	Affirmed
IN RE D.L.W. No. 17-464	Mecklenburg (15JT355)	Affirmed
IN RE D.S. No. 17-290	Mecklenburg (15JA612)	Vacated and Remanded
IN RE J.E.J.B. No. 17-289	Wake (15JT167-168)	Remanded
IN RE L.L. No. 17-337	Surry (15JT66-67)	Affirmed
IN RE M.D.-W. No. 17-256	New Hanover (15JA206-207)	Affirmed.
IN RE S.M.C. No. 17-452	New Hanover (15JT186)	Affirmed
IN RE T.M.S. No. 17-380	Guilford (15JT222)	Affirmed
INTERNAL CREDIT SYS., INC. v. NAUTUFF LLC No. 17-54	Durham (16CVD2173)	Reversed
McLAWHORN v. N.C. DEP'T OF ENV'T & NAT. RES. No. 17-206	N.C. Industrial Commission (TA-23111)	Affirmed

PEOPLES v. TUCK No. 16-293-2	Vance (15CVS12)	Reversed
STATE v. CLARK No. 16-1194	Stanly (15CRS50129) (15CRS50132)	No Error
STATE v. ERVIN No. 17-324	Wake (13CRS219242)	REVERSED IN PART, NO ERROR IN PART, AND REMANDED.
STATE v. GREENE No. 16-1309	Mecklenburg (14CRS238553-54)	No prejudicial error.
STATE v. HEADEN No. 16-1196	Randolph (09CRS5778) (09CRS5782) (11CRS50457) (11CRS50696-97)	Dismissed
STATE v. HOWARD No. 17-77	Wayne (10CRS51358-62)	Dismissed in Part; No Error in Part.
STATE v. MATHIS No. 17-126	Rowan (11CRS53038) (11CRS53246) (13CRS2949-50)	No Error
STATE v. McINTYRE No. 16-801	New Hanover (15CRS54379) (15CRS6891)	N o Error
STATE v. McKENITH No. 17-81	Duplin (13CRS51177-79) (13CRS882)	No Error
STATE v. McREED No. 17-229	Mecklenburg (14CRS243974-75) (14CRS243977)	No Error
STATE v. MILLER No. 17-216	Union (12CRS53801)	No Error
STATE v. NEWKIRK No. 17-2	Harnett (15CRS56050)	Affirmed
STATE v. SYDNOR No. 17-48	Wake (14CRS1819) (14CRS206568)	No Error

STATE v. THOMAS No. 17-140	Caldwell (13CRS1110-11)	Affirmed
STATE v. WALLACE No. 17-245	Guilford (14CRS75301)	No Error
STATE v. WELCH No. 16-1184	Anson (13CRS640)	Affirmed

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